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1337

United States

1337

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN COMMERCIAL COMPANY OF
ALASKA, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska,
Fourth Division.

FILED

JAN 15 1923

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN COMMERCIAL COMPANY OF
ALASKA, a Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN A. CLARK, Attorney for Defendant and Plaintiff in Error, Fairbanks, Alaska.

JOHN RUSTGARD, Attorney General for Alaska, Juneau, Alaska, GUY B. ERWIN, United States District Attorney, Fairbanks, Alaska, Attorneys for Plaintiff and Defendant in Error.
[1*]

In the District Court for the Territory of Alaska,
Fourth Division.

No. 2600.

TERRITORY OF ALASKA,

Plaintiff,

vs.

NORTHERN COMMERCIAL COMPANY OF
ALASKA, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To Rob't W. Taylor, Clerk of the Above-entitled Court:

You will please prepare transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon writ of error heretofore perfected to said Court, and will include in said transcript the following documents, papers and records, to wit:

*Page-number appearing at foot of page of original certified Transcript of Record.

2 *Northern Commercial Company of Alaska*

1. Complaint.
2. Demurrer to complaint.
3. Minute order of date of November 8, 1922, overruling demurrer to complaint.
4. Memorandum decision of Court on demurrer.
5. Minute order of clerk on November 24, 1922, relative to defendant declining to plead further, and motion for judgment on pleadings made by plaintiff, and order for judgment on pleadings.
6. Judgment.
7. Petition for writ of error.
8. Assignment of error.
9. Order allowing writ of error and fixing supersedeas bond.
10. Order relative to supersedeas bond on writ of error.
11. Writ of error.
12. Citation of writ of error.
13. Undertaking on writ of error and supersedeas with order approving same. [2]
14. Designation of place for hearing writ of error.
15. Order extending time for docketing and entering writ of error with clerk of the Circuit Court of Appeals.
16. Stipulation relative to printing record.
17. Praecipe for transcript.
18. Petition for order extending time within which to file and docket cause on writ of error.

This transcript to be prepared as required by law and the orders and rules of this Court, and of the United States Circuit Court of Appeals for the

Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals at San Francisco, California, on or before the 11th day of January, 1923, pursuant to the order of this Court extending time.

Dated at Fairbanks, Alaska, this 24th day of November, 1922.

JOHN A. CLARK,
Attorneys for Defendant in Error.

Due service of the foregoing praecipe for transcript, and receipt and copy thereof, acknowledged this 24th day of November, 1922.

JOHN RUSTGARD,
C. B. ERWIN,
Attorney for Defendant in Error.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [3]

[Title of Court and Cause.]

Complaint.

Plaintiff herein complains of defendant and for cause of action alleges:

FIRST CAUSE OF ACTION.

I.

That defendant is and during all the time herein mentioned has been a corporation duly organized and existing as such under and by virtue of the laws of the State of Washington and during the time

4 *Northern Commercial Company of Alaska*

herein mentioned was engaged in dealing in furs at Circle in Circle Recording Precinct, Territory of Alaska, and as such had and held a license as a stationary fur buyer at said place under and pursuant to the provisions of Chapter 42 of the Laws of Alaska for the year 1921.

II.

That while such stationary fur buyer and licensee at said place defendant purchased or otherwise acquired on and between the 13th day of January and the 27th day of July, 1922, the following pelts, to wit: 3 mink, 9 marten, 6 lynx, 2 beaver, 1002 muskrats.

III.

That by reason of said facts there became due and owing the Territory of Alaska under and pursuant to the provisions of said Chapter 42 the following license tax, to wit: On each mink pelt the sum of 25¢, on each marten pelt the sum of 50¢, on each lynx pelt the sum of 50¢, on each beaver pelt the sum of 50¢, on each muskrat pelt the sum of 5¢, and that by reason [4] of said facts the aggregate license tax thus owing from defendant to plaintiff on said pelts above enumerated is the sum of fifty-nine dollars and thirty-five cents (\$59.35).

IV.

That no part of said tax has ever been paid though often demanded, and the defendant refuses to pay the same or any part thereof.

V.

That said tax is a first and paramount lien upon

the pelts above enumerated and upon all the other property of the defendant.

SECOND CAUSE OF ACTION.

I.

That the defendant is and during all the time herein mentioned was a corporation duly organized and existing as such under and by virtue of the laws of the State of Washington and during the time herein mentioned was engaged in dealing in furs at Tanana in Fort Gibbon Precinct in the Territory of Alaska, and as such had and held a license as a stationary fur buyer at said place under and pursuant to the provisions of Chapter 42 of the laws of Alaska 1921. That while said stationary fur buyer and licensee at said place defendant purchased or otherwise acquired on and between the first day of January and the thirty-first day of July, 1922, the following pelts, to wit: 34 black bear, 356 beaver, 4 cross-fox, 28 red fox, 4 white fox, 477 marten, 155 mink, 12 lynx, 17 land otter, 20,292 muskrats, 169 weasel.

III.

That by reason of said facts there became due and owing the Territory of Alaska under and pursuant to the provisions of said Chapter 42 the following license tax, to wit: On each black bear pelt 50¢; on each beaver pelt 50¢ on each cross fur pelt \$1.00; on each red fox pelt 50¢; on each white fox pelt \$1.00; on each marten pelt 50¢; on each mink pelt 25¢; on each lynx pelt 50¢; on each land otter pelt 50¢; on each muskrat pelt 5¢; on each weasel pelt 5¢; and that by reason of said facts the aggregate license tax

thus owing from defendant to plaintiff on said pelts above [5] enumerated is the sum of \$1531.80.

IV.

That no part of said tax has ever been paid though often demanded and defendant refuses to pay the same or any part thereof.

V.

That said tax is a first and paramount lien upon the pelts above enumerated as well as upon all other property belonging to defendant.

WHEREFORE plaintiff demandes judgment against the defendant in the sum of \$1591.15, together with the costs and disbursements herein and prays the Honorable Court that said judgment be decreed to be a first and paramount lien upon the pelts above enumerated and upon all other property of the defendant.

JOHN RUSTGARD,
Attorney General for Alaska.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

John Rustgard, being first duly sworn, deposes and says that he is Attorney General for the Territory of Alaska; that he has read the foregoing complaint and believes the same to be true.

JOHN RUSTGARD.

Subscribed and sworn to before me this 24th day of August, A. D. 1922.

[Seal]

EARNEST B. COLLINS,
Notary Public in and for the Territory of Alaska.

My commission expires 18th day of November, 1923.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1922. Robt. W. Taylor, Clerk. By R. H. Geoghegan, Deputy. [6]

[Title of Court and Cause.]

Demurrer.

Comes now the defendant above named and demurs to plaintiff's complaint on file in the above-entitled cause upon the following grounds, to wit:

Demurs to the alleged first cause of action upon the grounds:

1. That the matters and things therein set forth do not constitute a cause of action against this defendant.

2. That Chapter 42 of the Session Laws of the Territory of Alaska, for the year 1921 is void for the following reasons:

- a. That the subject matter of said act is not set forth in the title thereto.
- b. That the Alaska legislature was without power or jurisdiction to enact said law and said act is in violation of the provisions of the Organic Act under which said legislature was created.
- c. That said Act is in violation of Interstate Commerce and interferes therewith and is void by reason thereof.

- d. That said Act of the said legislature is not applicable to the Territory of Alaska and is not made so by the terms thereof.
- e. That that portion of said law which attempts to levy a tax upon furs is void.

Demurs to the alleged second cause of action upon the grounds:

1. That the matters and things therein set forth do not constitute a cause of action against this defendant. [7]

2. That Chapter 42 of the Session Laws of the Territory of Alaska, for the year 1921 is void for the following reasons:

- a. That the subject matter of said act is not set forth in the title thereto.
- b. That the Alaska legislature was without power or jurisdiction to enact said law and said act is in violation of the provisions of the Organic Act under which said legislature was created.
- c. That said Act is in violation of Interstate Commerce and interferes therewith and is void by reason thereof.
- d. That said Act of said legislature is not applicable to the Territory of Alaska and is not made so by the terms thereof.
- e. That that portion of said law which attempts to levy tax upon furs is void.

WHEREFORE, defendant prays that said complaint be dismissed and that defendant go hence with his costs incurred herein.

JOHN A. CLARK,
Attorney for Defendant.

Due service of the foregoing and receipt of a copy thereof is hereby admitted this 30 August, 1922.

JOHN RUSTGARD.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 30, 1922. Robt. W. Taylor, Clerk. By R. H. Geoghegan, Deputy. [8]

[Title of Court and Cause.]

Minutes of Court—November 8, 1922—Order Overruling Demurrer.

Now, on this day, G. B. Erwin, United States Attorney, appearing for the plaintiff, John A. Clark, Esq., appearing for the defendant, the Court having heretofore taken this matter under advisement—

IT IS ORDERED that defendant's demurrer be, and it is hereby, overruled.

CECIL H. CLEGG,

District Judge. [9]

[Title of Court and Cause.]

Memorandum Opinion on Demurrer.

This is an action by the Territory to recover the amount of unpaid license fees and declaring a lien for the business of dealing in furs as a stationary fur buyer within the Territory for the year 1921, pursuant to the provisions of Chapter 42 of the Session Laws of Alaska, 1921, page 132.

There are two causes of action; one embracing the business of the defendant at Circle and the other at Tanana, Alaska. The total amount claimed to be due is \$1591.15.

The defendant has demurred to the separate causes of action on the grounds: (a) That the facts stated do not constitute a cause of action against the defendant; and, (b) that Chapter 42 of the Session Laws of the Territory above referred to is unconstitutional and void for the following reasons:

First: That the tax imposed is a property tax in the guise of a license tax; and

Second: That the act embraces more than one subject, and that the subject thereof is not embraced in the title.

The title of the Act and sections I, II, III, X and XI, are especially involved in these objections.

All the provisions of the Act are criticised by counsel, but the Court's consideration of them is limited to the scope of the grounds assigned and relied upon by the demurrer. [10]

It is conceded by the parties that the defendant has paid the license fee prescribed by Section I of the Act under consideration.

A decision on subdivision "B" of the demurrer will cover the entire grounds thereof.

The Court recognizes the rule to be that every presumption is in favor of the validity of legislative acts, and the obligation rests on the Court to so construe them as to make them operative.

1 Mont. 21 (205 Pac. Rep. 962).

In the last cited case, page 963, it is said:

“It is a universally recognized rule of construction in testing the validity of a statute subject to two constructions, one of which will uphold its validity, while the other will condemn it, that the former will be adopted if it can be done without violence to the fair meaning of the words employed. *State vs. Kahn*, 56 Mont. 108, 182 Pac. 197.”

In the case of *State vs. State Board of Equalization*, 56 Mont. 413, 85 Pac. 708, 86 Pac. 697, it is said: “Every reasonable doubt favors the validity of the statute.” This is also the rule in the State of Oregon. “It may be premised that courts will not pronounce an act of the legislature void or unconstitutional unless such unconstitutionality clearly appears beyond a reasonable doubt.”

Cline vs. Greenwood, 10 Ore. 230.

Kadderly vs. Portland, 44 Ore. 118, 74 Pac. 710,
75 Pac. 222.

State vs. Walton, 53 Ore. 557, 99 Pac. 431, 101
Pac. 389, 102 Pac. 173.

Straw vs. Harris, 54 Ore. 424, 103 Pac. 777.

Miller vs. Henry, 124 Pac. 198.

Pleasant Grove City vs. Holman, 202 Pac. 1098.

It is also said by Chief Justice Waite in the *Sinking Fund* cases, 99 U. S. 718: Every possible presumption is indulged “in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.” [11]

Mr. Justice Peckham, in *Nicol vs. Ames*, 173 U. S. 515, said: “It is only when the question is

free from any reasonable doubt that the Court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest." This is the undoubted rule of decision as applied in a great number of cases both by the Supreme Court and the inferior Federal Courts.

In the case of *The Abhy Dodge*, 223 U. S. 175, Mr. Chief Justice White, speaking of a statute of the United States, said:

"This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted."

The Court approaches the consideration of the question to be determined in the light of the foregoing decisions. I must also ascertain, if possible, from the Act itself and the declaration of the legislature therein, its main purpose.

"The declared purpose of the Act has to be accepted as true unless incompatible with its meaning and effect."

98 N. E. 1059, *White Dental Mfg. Co. vs. Commonwealth*.

See, also, *Camas Stage Co. vs. Kozer*, 209 Pac. 96.

In *Flint vs. Stone-Tracy Co.*, 220 U. S. 145, the Supreme Court says:

“While the mere declaration contained in that statute, that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the Act, nevertheless the declaration of the law-making power is entitled to much weight.”

It will be seen that the title of the Act is “To Impose a License Tax on the Business.” A license tax on business is not new in this Territory. We not only have a license tax on business imposed by the Federal Government, [12] but we have previously had two acts of the legislature with reference to license taxes on business. Session Laws, 1913, Chapter 52, approved May 1, 1913; also Session Laws 1915, Chapter 76, approved April 29, 1915. The validity of these Acts on certain classes of business have been uniformly sustained.

Alaska, Fish, Salt & By-Products Co. vs. Smith, (U. S.), 65 Law Ed. 489.

Alaska-Pacific Fisheries Co. vs. Alaska, 236 Fed. 52.

Hoonah Packing Co. vs. Alaska, 236 Fed. 61.

Alaska Salmon Co. vs. Alaska, 236 Fed. 62.

Alaska-Mexican Gold Mining Co. v. Alaska, 236 Fed. 64.

Alaska-Pacific Fisheries vs. Alaska, 236 Fed. 70.

In the above case of the Alaska Fish, Salt & By-Products Co. vs. Smith, the Court by Mr. Justice Holmes, says:

“The provisions against taxing in excess of one per centum of the assessed valuation of property does not apply to a license tax like this. This is not a property tax.”

The Court can see no difference in principal from a license tax of two dollars a barrel and two dollars a ton, respectively, upon persons engaged in the business of manufacturing fish oil, fertilizer and fish meal, in whole or in part, from herring and the license tax required of persons engaged in fur farming, trapping and trading in pelts and skins of fur bearing animals.

Counsel for the defendant contends as follows: “The defendant contends that, while the legislature was authorized to impose *as* a license tax as a condition to the conducting of business by the defendant, and that they could have elected to make an absolutely arbitrary tax of any given amount, even a tax so high that it would have been confiscatory of their property, or they could have levied an excise tax based upon the gross or net business done by the fur buyer or dealer, [13] yet when they attempted to levy a tax upon each piece of property handled by the fur buyer or dealer under his license, that they were then levying an *ad valorem* on the *rem* and that this tax was not levied in accordance with the provisions of the organic act; that is to say, no attempt was made to ascertain the actual value of the property taxed, but an arbitrary amount was fixed upon each pelt, and that at a rate far in excess of the total taxable rate that might be fixed by the legislature.

This argument is based upon the fact that the legislature, in Section One of the Act, prescribes a preliminary license fee of \$10.00 for the business of fur farming, \$25.00 for stationary fur buyers, and \$150.00 for itinerant fur buyers, and that Section 3 says:

“In addition to the license fee above provided for the licensee shall pay to the Commissioner who issues the license the following license fees on each pelt taken by a fur farmer, or purchased, or otherwise acquired, by a fur buyer, or taken by a trapper and not sold to a licensed fur buyer, to wit”:

Then follows a designation of the various kinds of skins of fur-bearing animals following by the amount of license tax payable upon each kind.

The legislature might have incorporated all of Section 3 into Section 1 if they had chosen to do so; but it is clear that the two sections must be read together and given effect accordingly and that the clear intent of the legislature was to require persons engaged in the designated businesses to declare themselves before the Commissioner and pay the preliminary license fee, and at the conclusion of their year's business to pay the amounts due to the Territory based and computed upon the number and kinds of skins taken, purchased or otherwise acquired, so that the method they adopted, according to their lights, was a fair and equitable method of determining the measure or *quantum* of the license tax payable. While the method adopted by the legislature may be subject to some criticism, it can-

not be fairly said that the license fees imposed are a tax upon the property.

In the case of the Alaska-Mexican Gold Mining Co. vs. The Territory [14] *supra*, the Circuit Court of Appeals, through Circuit Judge Hunt, says:

“It will be readily granted that the Act is not as explicit as it should be, and that its application calls for a postponement of the payment of the tax until the amount of revenue from the business taxed can be ascertained, but the fact that it is inartificially drawn and that its exact enforcement may be difficult ought not to make it invalid if the language used expresses a plain meaning by the law-making body, * * * the attention being plain the inartificiality of the law should not result in its overthrow.” Citing:

Johnson vs. Southern Pacific, 196 U. S. 1, 49 Law Ed. 363.

Cliquot's Champagne, 70 U. S. 114, 18 Law Ed. 116.

U. S. vs. Stowell, 133 U. S. 1 (12), 33 Law Ed. 555.

While it is true that any business engaged in for profit is property in a sense, the license fees imposed by this Act are clearly in the nature of an excise for the privilege of carrying on business and in no sense a property tax.

The defendant earnestly relies upon the case of Thompson vs. McLeod, 112 Miss. 383, 73 So. 193, in

contending that the tax imposed by the Act in question is a property tax.

In that case the Court says:

“The act here assailed does not even attempt to require a license or permit to be issued by any officer or department of the Government as a condition precedent to the right of a citizen to extract crude turpentine from pine trees.”

Further it says:

“Section 1 of the act makes no effort to conceal the subject matter of the tax. It expressly declares that it is ‘levied on the gross annual cutting or extraction.’ ”

Further on it says:

“Appellee, in taking crude gum from his own trees, is not directly engaged in any kind of mercantile business. He does not bring his wares into the market place nor upon stock markets.”

There is no question in this particular case as to whether the occupation of fur farming, stationary fur buyer or trapper is a business or occupation upon which the legislature may lawfully impose license fees for the privilege of engaging in the business. Furthermore, a property [15] tax is an incident of ownership, while in the business of a stationary fur buyer the person so engaged “may purchase or otherwise acquire,” as the act says, raw skins of fur-bearing animals in this country without necessarily having any ownership therein himself.

I therefore hold that the provisions of the act do not contravene Section 9 of the Organic Act, which

provides that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per cent upon the assessed valuation of the property therein in any one year."

Section 8 of the Organic Act (Act of Congress August 24, 1912, 37 Stat. 512) provides.—

"That the enacting clause of all laws passed by the legislature shall be 'Be it enacted by the legislature of the Territory of Alaska.' No law shall embrace more than one subject, which shall be expressed in its title."

It is contended by the defendant that the act assailed violates this provision of the Organic Act, and that it in effect imposes a license tax but really imposes a property tax, and in addition thereto provides penalties for failure to abide by the various terms of the act, and further provides for imprisonment for failure to abide by the provisions of the law.

From which I have said heretofore I find no merit in the contention that this act imposes anything more than a license tax; but it does provide for certain penalties for failure to observe its requirements. These requirements, however, are the same as those imposed in all previous acts of the legislature and of Congress with reference to business taxes, and the Court, in considering this particular act, must take notice of previous legislation on the subject.

It is contended by counsel that this provision of the Organic Act is mandatory, and in this the Court agrees; but it is not necessary that the subject matter as expressed in the title of the act under this constitutional requirement should give an index of all the provisions of the act. [16]

In the case of *In Re County Commissioners*, 98 Pac. 557, in discussing a similar constitutional provision, the Court says:

“The abuses which called such provision into existence are clearly understood and are two-fold. Each subject brought into the deliberation of the legislative department of the government is to be considered and voted on singly, without having associated with it any other measure to give it strength. Experience had shown that measures having no common purpose, and each wanting sufficient support on its merits to secure its enactment, have been carried through legislative bodies and enacted into laws, when neither measure could command or merit the approval of a majority of that body.

“The other abuse against which this provision was leveled was to prevent matters foreign to the main objects of a bill from finding their way into such enactment surreptitiously. Substantially such a provision is found in many of the State Constitutions, and, as is usual in such cases, judges have differed in their interpretation of the same. The best considered cases, however, appear to have established the following propositions: That the clause is man-

datory; that its requirements are not to be exactly enforced; or in such a technical manner as to cripple legislation; that the title of a bill may be very general, and need not contain an abstract of the contents of the bill, or specify every clause therein, it being sufficient if they are all referable and cognate to the subject expressed. Everything which is necessary to make a complete enactment, or to result as a complement of the thought therein contained, is included in and authorized by such title expressed in general terms."

"Weaver et al. vs. Lapsley, 43 Ala. 224.

Walker vs. State, 49 Ala. 329.

Lockhart vs. City of Troy, 48 Ala. 579.

Ballentyne vs. Wickersham, 75 Ala. 535.

State vs. Rogers, 107 Ala. 444, 19 South. 909,
32 L. R. A. 520.

Lindsay vs. United Savings & Loan Association
et al., 120 Ala. 172, 24 South. 171, 42 L. R. A.
783.

Woodson vs. Murdock, 22 Wall. 351, 22 L. Ed.
716.

State ex rel. vs. Squires, 26 Iowa, 340.

Cannon vs. Mathes, 8 Heisk. (Tenn.) 504.

State vs. Miller, 45 Mo. 495.

Chiles vs. Drake, 2 Metc. (Ky.) 146, 74 Am.
Dec. 406.

Keller vs. State, 11 Md. 525, 69 Am. Dec. 226.

[17]

Simpson vs. Bailey, 3 Or. 515.

Lafon vs. Defrocq et al., 9 La. Ann. 350.

State vs. Gerhart, 44 N. E. 475."

cited with approval and followed in *State vs. Bonner*, 208 Pac. 827.

Giving effect to the rules therein announced, I see no such weakness in the adoption by the legislature of a broad and comprehensive title in this Act as renders the act unconstitutional by reason thereof, nor does such a result follow the failure of the legislature to state in the title with the same fullness as in previous acts on the same subject the contents thereof. There is no possibility that any of the abuses which this constitutional provision was intended to prevent arose by the use of a broad, general and comprehensive title.

The Court also holds by necessity that the subject of the act is clearly expressed in the title.

Other criticisms leveled in the brief at other sections of the act are unsubstantial and do not fairly arise under the issues.

The demurrer may be overruled.

CECIL H. CLEGG,
District Judge.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 8, 1922. Robt. W. Taylor, Clerk. By Frank O'Farrell, Deputy. [18]

[Title of Court and Cause.]

**Minutes of Court — November 24, 1922 — Order
Granting Motion for Judgment on Pleadings.**

Now on this day John A. Clark, Esq., counsel for the defendant, stated to the Court that he declined

to plead further herein, whereupon G. B. Erwin, Esq., counsel for the plaintiff, offered oral motion for judgment on the pleadings in behalf of the pleader, and the Court being fully and duly advised in the premises—

IT IS ORDERED that plaintiff's motion for judgment on the pleadings be, and is hereby granted.

CECIL H. CLEGG,

District Judge. [19]

[Title of Court and Cause.]

Judgment.

This cause coming regularly on for hearing on motion of attorney for plaintiff for judgment on the pleadings; and it appearing from the files and proceedings in said cause that on the 8th day of November, 1922, an order of this Court was duly made and entered herein overruling defendant's demurrer to plaintiff's complaint; and the defendant, by its attorney John A. Clark, Esq., having this day in open court declined to plead further to said complaint, the Court being fully advised in the premises, does hereby grant plaintiff's motion for judgment as prayed for in said complaint.

And it appearing to the satisfaction of the Court from the records and files herein that on and between the 13th day of January and the 27th day of July, 1922, the defendant Northern Commercial Company of Alaska acquired by purchase or otherwise pelts of wild fur-bearing animals, to wit: 3 mink, 9 marten, 6 lynx, 2 beaver and 1002 muskrats

on which defendant has failed, neglected and refused as licensed fur buyer to pay the tax due plaintiff thereon under the provisions of Chapter 42, Session Laws of Alaska, 1921, in the sum of \$59.35 as alleged in the first cause of action in the complaint herein; and it further so appearing that on and between the 1st day of January and the 31st day of July, 1922, the defendant acquired by purchase or otherwise pelts of wild fur-bearing animals, to wit: 34 black bear, 356 beaver, 4 cross-fox, 28 red fox, 4 white fox, [20] 477 marten, 155 mink, 12 lynx, 17 land otter, 20,292 muskrats, and 169 weasel, on which defendant has failed, neglected and refused to pay as licensed fur buyer, the tax due plaintiff thereon as provided by said Territorial Act, in the sum of \$1531.80 as set forth in plaintiff's said second cause of action, and that said tax constitutes *as* first and paramount lien upon said taxed property and all the property of defendant.

NOW, THEREFORE, it is hereby considered ordered and ADJUDGED that the Territory of Alaska, plaintiff, do have and recover of and from the Northern Commercial Company of Alaska, defendant, upon the first cause of action set out in its complaint herein, the sum of fifty-nine and 35/100 Dollars (\$59.35) and upon the second cause of action set out in its complaint herein, the sum of fifteen hundred thirty-one and 80/100 Dollars, together with plaintiff's costs and disbursements herein, taxed at the sum of \$14.60, making in all the total sum of \$1605.75.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that said judgment be and the same hereby is declared to be a first and paramount lien upon the taxed property hereinbefore described; that said property be by the U. S. Marshal for said Territory and Division, seized and sold as provided by law for the sale of property upon execution and out of all sums realized from such sale the costs and disbursements of this action and the costs incurred by such sale, together with the amount of the taxes hereinbefore found to be due be first paid, and the remainder if any be paid to the defendant; that in case such taxed property fail to produce at such sale sufficient to pay such costs and disbursements, costs of sale and tax, then plaintiff to have execution against the property of the defendant for the balance due thereon.

Done in open court at Fairbanks, Alaska, this 24th day of November, 1922.

Entered in Court Journal No. 15, 564.

CECIL H. CLEGG,

District Judge. [21]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [22]

[Title of Court and Cause.]

Petition for Writ of Error.

The Northern Commercial Company of Alaska, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the order of this Court

made and entered on the 8th day of November, 1922, overruling defendant's demurrer to plaintiff's complaint on file herein, and by the judgment of the above-entitled court given, made and entered in the above-entitled cause on the 24th day of November, 1922, which said judgment was in favor of plaintiff and against defendant, and was for the sum of \$1591.15, together with costs in the sum of \$14.60, in which judgment, and in the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Now comes John A. Clark, attorney for defendant, and petitions this Honorable Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided. [23]

And whereas, said defendant desires a stay of execution pending the hearing of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, said defendant petitions that an order may be made fixing the amount of the security which shall be given and furnished on the said writ of error to cover the costs incurred therein, and as a supersedeas, and that on the giving of such security, all further proceedings of this Court herein may be suspended and stayed until the determination of said writ of error by the

said United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

JOHN A. CLARK,

Attorney for Defendant.

Due service hereof admitted this 24th day of November, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attorneys for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [24]

[Title of Court and Cause.]

Assignment of Error.

Comes now the defendant in the above-entitled cause, being the plaintiff in error, and assigns the following error as having been committed by the above-named court prior to and at the rendition of the judgment given, made and entered in said cause on the 24th day of November, 1922, which error the said defendant intends to and does rely upon on defendant's writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, to wit:

I.

That the United States District Court for the Fourth Division of the Territory of Alaska erred in overruling the demurrer interposed by the de-

fendant and plaintiff in error to the original complaint filed in the cause.

II.

That said Court erred in upholding Chapter 42 of the Session Laws of the Territory of Alaska for the year 1921, and in refusing to declare Section 3 of said Act unconstitutional and void. [25]

III.

That said Court erred in assuming jurisdiction of said cause, and in refusing to dismiss said cause for lack of jurisdiction or authority to hear and determine same.

IV.

That said Court erred in giving, making, and entering judgment in favor of plaintiff and against defendant upon plaintiff's complaint on file in said cause, which said judgment was given, made and entered on the 24th day of November, 1922, and was for the sum of \$1591.15, together with costs in the sum of \$14.60.

V.

That said Court erred in failing to dismiss plaintiff's action.

VI.

That said Court erred in failing and refusing to enter judgment in favor of defendant.

WHEREFORE, plaintiff in error, defendant named above, prays that said order of said Court, overruling defendant's demurrer, and the judgment of said District Court made and entered on the 24th day of November, 1922, be reversed, and that said District Court for the Fourth Judicial Division for

the Territory of Alaska be ordered to enter Decree, reversing the decision of the lower Court in said cause, and sustaining defendant's demurrer to plaintiff's complaint on file in said action, and [26] dismissing said cause at plaintiff's cost.

JOHN A. CLARK,

Attorney for Plaintiff in Error.

Dated November 24, 1922.

Service of foregoing and receipt of copy thereof hereby admitted this 24 November, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attys. for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [27]

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Supersedeas and Cost Bond.

On motion of John A. Clark, attorney for defendant, and the filing of his petition for writ of error and assignment of errors—

IT IS HEREBY ORDERED that a writ of error be, and the same is hereby, allowed to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, the order overruling defendant's demurrer, heretofore made and entered on the 8th day of November, 1922, and the judgment here-

tofore made and entered herein on the 24th day of November, 1922; and that the amount of the bond on said writ of error be, and the same is hereby fixed at the sum of Twenty-five Hundred Dollars (\$2500.00), to cover supersedeas and costs of defendant in error.

Done at Fairbanks, Alaska, on this 24th day of November, 1922.

CECIL H. CLEGG,

District Judge.

Due service admitted hereof this 24th day of November, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attorneys for Plaintiff.

Entered in Court Journal No. 15, page 565. [28]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [29]

[Title of Court and Cause.]

Writ of Error.

United States of America,

Territory of Alaska,—ss.

The President of the United States of America, to
the Honorable CECIL H. CLEGG, Judge of
the United States District Court, Fourth
Judicial Division, GREETING:

Because in the records and proceedings, as also
in the rendition of a Judgment dated the 24th day

of November, 1922, of a plea which is in said United States District Court for the Territory of Alaska, Fourth Judicial Division, before you between the Territory of Alaska, as plaintiff, and the Northern Commercial Company of Alaska, a corporation, as defendant, manifest error hath happened to the great prejudice and damage of said Northern Commercial Company of Alaska, as is said and appears in the petition herein;

We, being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if said judgment be therein given, then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all [30] things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place, in said Circuit Court of Appeals on the 24th day of December, 1922, that, the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct such error what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of November, A. D. one thousand nine hundred and twenty-two.

ATTEST my hand and seal of the United States District Court for the Territory of Alaska, Fourth Judicial Division, at the Clerk's office in the town of Fairbanks, Alaska, this 24th day of November, A. D. one thousand nine hundred and twenty-two.

[Seal]

ROBT. W. TAYLOR,

Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division.

Allowed this 24th day of November, A. D. one thousand nine hundred and twenty-two.

CECIL H. CLEGG.

Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

Due service of the foregoing writ of error admitted this 24th day of November, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attorneys for Plaintiff. [31]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy.

[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States of America, to the Territory of Alaska, and JOHN RUSTGARD, Attorney General for the Territory of Alaska, and GUY B. ERWIN, United States District Attorney for the Fourth Division of the Territory of Alaska, its Attorneys, GREETING:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the Clerk of the United States District Court for the Territory of Alaska, Fourth Judicial Division, wherein the Northern Commercial Company of Alaska, a corporation, is plaintiff in error, and the Territory of Alaska is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, on this 24th day of November, A. D. one thousand nine hundred twenty-two, and in the year of our Independence the one hundred forty-seventh. [32]

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this 24th day of November, A. D. one thousand nine hundred twenty-two.

CECIL H. CLEGG.

District Judge.

Due service of the foregoing citation admitted this 24th day of November, 1922.

JOHN RUSTGARD,

J. B. ERWIN,

Attorneys for Defendant in Error. [33]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy.

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendant having on this day filed its petition for writ of error from the order of this Court made and entered on the 8th day of November, 1922, overruling defendant's demurrer to plaintiff's complaint, and the judgment made and entered herein on the 24th day of November, 1922, in favor of plaintiff and against defendant, to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, together with an assignment of error within due time, and also praying that an order be made, fixing the amount of security which defendant shall give and furnish on said writ of error, and that on the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals, and said petition having been this day duly allowed and supersedeas and cost bond fixed.

NOW, THEREFORE, IT IS ORDERED: That upon defendant's filing with the Clerk of this court a good and sufficient bond in the sum of Twenty-five Hundred Dollars (\$2500.00), conditioned as a cost

and supersedeas bond, all as provided by law, [34] which said bond shall be approved by this Court, then and thereafter all proceedings in this Court shall be, and they are suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California.

Dated at Fairbanks, Alaska, this 24th day of November, 1922.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 565.

Due service of the foregoing Order admitted this 24th day of November, 1922.

JOHN RUSTGARD,
G. B. ERWIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [35]

[Title of Court and Cause.]

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, The Northern Commercial Company of Alaska, a corporation, as principal, and George Preston and Harry DeYonge, as sureties, are held and firmly bound unto the Territory of Alaska, the defendant in error, in the just and full sum of Twenty-five Hundred Dollars (\$2500.00), to be paid

to said defendant in error, which payment to be well and truly made, we bind ourselves, our heirs, executors, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of November, 1922.

WHEREAS, on the 24th day of November, 1922, in the United States District Court for the Territory of Alaska, Fourth Judicial Division, a Judgment was rendered against the said Northern Commercial Company of Alaska, a corporation, and the said defendant therein having obtained a writ of error and filed a copy thereof in the office of the Clerk of said court, to reverse the judgment aforesaid, and a Citation directed in said action to the Territory of Alaska, plaintiff therein, citing and admonishing it to be and appear at a session of the United States [36] Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, on the 24th day of December, 1922; and

WHEREAS, the plaintiff in error desires a stay of execution in the above-entitled action pending a decision upon said writ of error by the Circuit Court of Appeals for the Ninth Circuit:

Now, the condition of the foregoing obligation is such that if the said Northern Commercial Company of Alaska, a corporation, shall prosecute said Writ of Error to effect and answer and pay all judgments, damages and costs if it fail to make its said plea good, then the foregoing obligation to

be void; otherwise to remain in full force, effect and virtue.

NORTHERN COMMERCIAL CO. OF
ALASKA, a Corporation.

By GEORGE PRESTON,
Agent and Attorney in Fact,
Principal.

GEORGE PRESTON,
Surety.

HARRY de YONGE,
Surety.

Approved this 24th day of November, 1922,
CECIL H. CLEGG,
District Judge.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [37]

United States of America,
Territory of Alaska,—ss.

George Preston and Harry de Yonge, being first duly sworn according to law, each for himself and not one for the other, on his oath deposes and says:

I am one of the sureties on the foregoing bond; I am not an attorney at law, United States marshal, deputy marshal, clerk of the court, commissioner, or other officer of any court in Alaska, and am worth the sum of Twenty-five Hundred Dollars (\$2500.00) over and above all my just debts and liabilities in property not exempt from execution.

GEORGE PRESTON.

HARRY de YONGE.

Subscribed and sworn to before me this 24th day of November, A. D. 1922.

[Seal]

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My Commission expires Apr. 24, 1926.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [38]

[Title of Court and Cause.]

**Petition for Order Extending the Time Within
Which to File and Docket Cause on Writ of
Error.**

To the Honorable CECIL H. CLEGG, Judge of the
Above-entitled Court, and to the Plaintiff
Above Named and Its Attorneys:

Comes now the defendant above named and respectfully represents to this Court and petitions as follows, to wit:

That, owing to the great distance that Fairbanks, Alaska, is from San Francisco, California, where the writ of error sued out in the above-entitled cause is to be heard, the uncertainty of mail facilities, and the fact that it will require the Clerk of the District Court at Fairbanks several days to prepare and certify to the records in said cause, that it may not be practicable or possible to file and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within the time allowed by law and the Order of this Court in allowing said writ of error,—

WHEREFORE, petitioner respectfully petitions this Court to make an order granting the defendant herein, plaintiff in error in said appeal, until and including the 11th day of January, 1923, within which to file and docket the said cause [39] on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

JOHN A. CLARK,

Attorney for Plaintiff in Error.

Receipt of copy of foregoing motion and notice thereof hereby acknowledged Nov. 24th, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attys. for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [40]

[Title of Court and Cause.]

Order Extending Time to and Including January 11, 1923, to File Record and Docket Cause.

This matter coming on for hearing on the motion of the defendant above-named, the plaintiff in error, for an order extending the time within which to file and docket the record herein on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of this Court that the time allowed by law and by the

orders of this Court allowing said writ of error is insufficient for the purpose, and that the plaintiff in error desires an extension of time until and including the 11th day of January, 1923, within which to file and docket said cause, as aforesaid, and all and singular the matters being fully understood and considered by this Court—

IT IS, THEREFORE, ORDERED: That the plaintiff in error be, and it is hereby given and granted until and including the 11th day of January, 1923, within which to file and docket its record on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California. [41]

Done in open court at Fairbanks, Alaska, this 24th day of November, A. D. one thousand nine hundred and twenty-two.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 565.

Due service hereof admitted this 24th day of November, 1922.

JOHN RUSTGARD,
G. B. ERWIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [42]

[Title of Court and Cause.]

Designation of Place for Hearing Writ of Error.

To the Honorable CECIL H. CLEGG, Judge of
the Above-entitled Court, and to the Plaintiff
and Its Attorneys:

Comes now the defendant, plaintiff in error, in the above-entitled cause, and, pursuant to the provisions of the Act of Congress giving the designation of the place for hearing all writs of error to the plaintiff in error, does hereby designate the City and County of San Francisco, State of California, as the place for the hearing of the writ of error in the above-entitled action.

Dated at Fairbanks, Alaska, this 24th day of November, 1922.

JOHN A. CLARK,
Attorney for Defendant.

Due service of the foregoing is hereby admitted on this 24th day of November, 1922.

JOHN RUSTGARD,
G. B. ERWIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [43]

[Title of Court and Cause.]

Stipulation Relative to Printing of Record.

It is hereby stipulated that in printing the papers and records to be used on the hearing on writ of error in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted in place of said title on all papers used as a part of said record the words, "Title of Court and Cause"; also that all endorsements on all papers used as a part of said record shall be omitted, except the Clerk's filing-marks and the admission of service.

Dated at Fairbanks, Alaska, this 24th day of November, 1922.

JOHN RUSTGARD,

G. B. ERWIN,

Attorneys for Plaintiff.

JOHN A. CLARK,

Attorney for Defendant.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 24, 1922. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [44]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Rob't W. Taylor, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 44 pages, numbered from 1 to 44, inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 2600, Territory of Alaska, Plaintiff and Defendant in Error, vs. Northern Commercial Company, a Corporation, Defendant and Plaintiff in Error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action, and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith, and I certify that the writ of error, citation on writ of error, and order enlarging return day annexed hereto, are the originals thereof.

And I do further certify that the index thereof, consisting of page numbered i, is a correct index of said transcript; also that the cost of preparing said transcript and this certificate, amounting to Eleven and 30/100 Dollars (\$11.30), has been paid to me by counsel for plaintiff in error in this action.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of this court this 1st day of December, A. D. 1922.

[Seal]

ROBT W. TAYLOR,

Clerk of the District Court, Territory of Alaska,

Fourth Division. [45]

[Endorsed]: No. 3959. United States Circuit Court of Appeals for the Ninth Circuit. Northern Commercial Company of Alaska, a Corporation, Plaintiff in Error, vs. Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed December 22, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3959

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

NORTHERN COMMERCIAL COMPANY OF

ALASKA (a corporation),

Plaintiff in Error,

VS.

TERRITORY OF ALASKA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN A. CLARK,

SLOSS, ACKERMAN & BRADLEY,

Attorneys for Plaintiff in Error.

FILED

FEB 10 1923

F. D. MONKTON,

CLERK

No. 3959

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN COMMERCIAL COMPANY OF
ALASKA (a corporation),

Plaintiff in Error,

VS.

TERRITORY OF ALASKA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case is before this court upon writ of error to the United States District Court of the Territory of Alaska. Action was instituted by the Territory of Alaska in the United States District Court for the Territory of Alaska, Fourth Division, against the plaintiff in error, Northern Commercial Company of Alaska, upon a complaint containing two causes of action. The first cause of action alleges that the defendant was engaged in dealing in furs in the Territory of Alaska and held stationary fur-buyer's license pursuant to the provisions of Chapter 42 of the laws of Alaska for the year 1921; that

while the defendant held such license, defendant purchased, or otherwise acquired, between January 13 and July 27, 1922, certain pelts, enumerating them, and that by reason thereof there became due to the Territory of Alaska under the law aforesaid, license taxes on each pelt in a certain sum, the aggregate tax thus becoming due being the sum of \$59.35, and claiming on behalf of the Territory a paramount lien upon the pelts enumerated and upon all of the property of the defendant.

The second cause of action is in the same form, differing only in the substance of the allegations, this count having reference to the business done by the defendant as a stationary fur-buyer at Tanana in Fort Gibbon precinct, Alaska, and the tax claimed aggregating the sum of \$1531.80, plaintiff praying for judgment in the sum of \$1591.15.

Defendant and plaintiff in error interposed a demurrer to each count of the aforesaid complaint, alleging that no cause of action was stated and that Chapter 42 of the Session Laws of the Territory of Alaska for the year 1921 is void for certain reasons, among others, that the legislature of the Territory of Alaska was without power or jurisdiction to enact said law; that said act is in violation of the provisions of the organic act under which said legislature was created; that the subject matter of said act was not set forth in the title and that the portion of the law which attempts to levy a tax upon furs is void.

The demurrer was overruled, and upon the defendant having declined to amend, the court ordered judgment on the pleadings, and thereupon judgment was entered against the defendant in the sum prayed for in the complaint and providing for a first and paramount lien upon the said taxed property and all of the property of defendant. Thereupon, the defendant petitioned for a writ of error, which petition was allowed.

I.

CHAPTER 42 OF THE SESSION LAWS FOR THE TERRITORY OF ALASKA FOR THE YEAR 1921, THE VALIDITY OF WHICH IS IN ISSUE ON THIS APPEAL.

“Chapter 42. An act to impose a license tax on the business of fur-farming, trapping and trading in pelts and skins of fur-bearing animals, and declaring an emergency.

Be it enacted by the legislature of the Territory of Alaska:

Section 1. No person shall engage in the business of fur-farming or of buying or dealing in furs without first securing from the Commissioner and Ex-officio Recorder a license so to do. The license fee for each license shall be ten dollars (\$10) for the business of fur-farming, twenty-five dollars (\$25) for stationary fur-buyers, and one hundred and fifty dollars (\$150) for itinerant fur-buyers, which fee shall be paid to the Commissioner before the license is issued.

Section 2. The license shall be issued for not more than one year and shall expire on the first day of August next after its issue. The application for the license shall be filed with the Commissioner and shall be accompanied by license fee. It shall give the name of the applicant and the business to be engaged in, the place where applicant wishes to conduct a business under the license, unless he be an itinerant, in which event that fact must be stated, and shall contain an agreement that the applicant as licensee will abide by and faithfully carry out the provisions of this act and before the end of the license year remit to the Commissioner the tax due upon the pelts handled, as herein provided. When such application is received by the said Commissioner, the latter shall issue the license, which shall state the name of the licensee, his place of business and the time when the license expires.

Section 3. In addition to the license fee above provided for the licensee shall pay to the Commissioner who issued the license the following license fees on each pelt taken by a fur-farmer or purchased or otherwise acquired by a fur-buyer, or taken by a trapper and not sold to a licensed fur-buyer, to-wit:

On each polar bear	\$ 2.50
“ “ brown bear	1.00
“ “ grizzly bear	1.00
“ “ black bear	.50
“ “ beaver	.50
“ “ fisher	2.00
“ “ fox, silver	3.50
“ “ “ black	3.50
“ “ “ cross	1.00
“ “ “ blue	1.50
“ “ “ red	.50
“ “ “ white	1.00
“ “ lynx	.50
“ “ marten	.50

On each mink	\$.25
“ “ muskrat .....	.05
“ “ otter, land .....	.50
“ “ otter, sea	100.00
“ “ weasel .....	.05
“ “ wildcat .....	.25
“ “ moose trophy	10.00
“ “ caribou trophy	5.00
“ “ deer trophy	2.50
“ “ sheep trophy	5.00
“ “ goat trophy	5.00
“ “ pelt not specifically mentioned in the above schedule.....	.10”

Other provisions of the act relating to the determination of the amount of tax, collection and enforcement will be set out hereinafter as occasion arises to deal with them.

II.

PROVISIONS OF THE ORGANIC LAW OF THE TERRITORY OF ALASKA TO WHICH REFERENCE WILL HEREINAFTER BE MADE.

An act to create a legislative assembly in the Territory of Alaska to confer legislative power thereon and for other purposes.

Act of August 24, 1912, Ch. 387, 37 Stat. L. 512.

“Sec. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED. That the constitution of the United States, and all the laws thereof which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establish-

ing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature; *Provided*, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof; *Provided further*, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of the district courts of the United States."

"Sec. 9. LEGISLATIVE POWER. The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States * * * provided all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum

upon the assessed valuation of the property therein in any one year.”

III.

ASSIGNMENT OF ERRORS RELIED UPON.

I. That the United States District Court for the Fourth Division of the Territory of Alaska erred in overruling the demurrer interposed by the defendant and plaintiff in error to the original complaint filed in the cause.

II. That said court erred in upholding Chapter 42 of the Session Laws of the Territory of Alaska for the year 1921, and in refusing to declare Section 3 of said act unconstitutional and void.

III. That said court erred in assuming jurisdiction of said cause, and in refusing to dismiss said cause for lack of jurisdiction or authority to hear and determine same.

IV. That said court erred in giving, making, and entering judgment in favor of plaintiff and against defendant upon plaintiff's complaint on file in said cause, which said judgment was given, made and entered on the 24th day of November, 1922, and was for the sum of \$1591.15, together with costs in the sum of \$14.60.

V. That said court erred in failing to dismiss plaintiff's action.

VI. That said court erred in failing and refusing to enter judgment in favor of defendant.

IV.

STATEMENT OF THE POSITION OF PLAINTIFF IN ERROR UPON THIS APPEAL.

It is conceded that the territorial legislature has the power to levy occupational or privilege taxes. It must likewise be conceded by our adversaries that no property tax can be levied without regard to the value of the property taxed. It is the contention of plaintiff in error that the territorial legislature has undertaken to do by indirection what cannot be directly done, that is, to levy under the guise or form of a license tax, a tax upon the property used in the business of fur-farming, trapping and trading in pelts and skins of fur-bearing animals. If force and effect is to be given to the provisions of the organic law prohibiting property taxes except after an assessment of the value of all the property in the territory and under a general law applicable to all the taxable property in the territory, then the legislature must not be permitted to levy a property tax simply by calling it a license tax and including it in the terms of a bill which is entitled "An act to impose a license tax". To hold otherwise, would, in effect, nullify the provisions of the organic act. We contend, therefore, that if it be shown that the tax imposed by Section 3 of the act in question is in

reality a property tax it must be adjudged void, despite the fact that it is included in an act imposing a license tax, and that the defendant in error cannot justify such tax upon the ground that it is simply a measurement of the amount of license tax to be paid by persons engaged in the business of fur-farming, trapping and trading in pelts and skins.

V.

PRELIMINARY DISCUSSION.

Section 1 of the act in question prohibits the pursuit of the business of fur-farming or of buying or dealing in furs without first securing a license so to do. The license fee is fixed at \$10.00 for the business of fur-farming, \$25.00 for stationary fur-buyers and \$150.00 for itinerant fur-buyers, which fee shall be paid to the Commissioner before the license is issued. The legislature of Alaska, we agree, has a right to levy such a license fee or excise tax. Under the terms of Section 3, however, of the act in question, the legislature requires the holder of the license authorized to be issued under the terms of Section 1 to pay an additional tax upon each pelt purchased or otherwise acquired by a fur-buyer. This exaction is, we contend, a tax upon property, arbitrarily assessed, without regard to the value of the property taxed, and therefore void under the provisions of Section 9 of the organic act above quoted providing that

“all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of the property therein in any one year.”

It is conceded that the legislature may lawfully, under the guise of an excise tax, tax the profits made by fur dealers or tax the appliances used by fur dealers in conducting their business. The legislature, however, cannot, by giving this tax the name of license tax, change its character as a property tax.

VI.

DISTINCTION BETWEEN A LICENSE TAX AND A PROPERTY TAX.

In entering upon a discussion of the law of this case, we must, of course, be mindful of the broad rules of construction by which the courts are guided in ascertaining the legislative intent. We must also recognize that this court has heretofore in other cases considered the right of the legislature of the Territory of Alaska to levy occupational or business taxes for the purpose of raising revenue, and has upheld such right. We must concede that if by a reasonable construction the tax here in question is in reality a tax on the business of fur-farming, trapping and trading in pelts and skins and is not a tax on property, it must be upheld. In approaching

the consideration as to what may be the proper construction of the act in question, it is important to point out the distinction between a license or occupation tax and a property tax.

An occupation or license tax is an exaction levied on the privilege of carrying on a business or performing some act which without the payment of the exaction would be prohibited. It is comprehended within the larger term of "excise taxes."

"Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word has, however, come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation."

26 R. C. L. 34.

Broadly, excises and property taxes are distinguished as follows:

"If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges

may be included in the valuation, it is considered a property tax."

26 R. C. L. 35.

More particularly it is said:

"It is sometimes difficult to determine from the wording of a statute or ordinance whether the tax imposed thereby is *upon property or upon business*; but where it is clearly a property tax, it will be so regarded, even though called a business tax, and, on the other hand, a tax which is levied upon persons on account of their business will be construed as a business tax, even though it is graduated according to the property used in such business." (Italics ours.)

21 *Amer. & Eng. Ency. Law*, 775.

"A license tax is not a property tax. The burden is not laid upon the rem. The license is exacted for the privilege of using the vehicle upon the public highways, * * *."

Windham v. State, 77 So. (Ala.) 963, 964.

In *Thompson v. McLeod*, 73 So. (Miss.) 193, where a so-called privilege or occupation tax was held in fact to be one on property, the court said:

"The imposition of such a tax is not on a business, but on the property involved."

From the foregoing authorities it is apparent that the two classes of taxes must be distinguished by determining from all the evidence whether it is the rem—the property—or the privilege of doing business that is the subject of the taxation.

VII.

**THE ACTUAL EFFECT OF THE TAX, AND NOT THE NAME
GIVEN IT IS DETERMINATIVE OF ITS CHARACTER.**

In its title, Chapter 42 of the law of 1921, purports to levy a license tax on the business of fur trading. The name thus given, however, is not controlling. The courts have repeatedly held that in these matters of taxation, they will look through form to substance, and will prevent that from being done by indirection which could not be accomplished directly.

Wheeler v. Weightman, 149 Pac. (Kan.) 977;
Choctaw O. & C. R. Co. v. Harrison, 235 U.
S. 292, 59 L. ed. 234;

Galveston H. & S. A. R. Co. v. Texas, 210
U. S. 217, 227, 52 L. ed. 1031, 1037;

21 *Amer. & Eng. Encyc. Law*, 775, *supra*.

In determining, therefore, whether the tax is in fact upon the property or on the business, its provisions and their actual effect must be controlling.

VIII.

**SECTION 3 OF THE ACT LEVIES A PROPERTY TAX ON FUR
PELTS, BECAUSE THE ACT ITSELF SHOWS THAT THE TAX
IS IMPOSED ON THE PELTS AND NOT ON THE BUSINESS.**

Necessarily, the language of the statute should first be considered in determining its construction, and the act in question when so considered shows unequivocally that the legislature in Section 3 levied a tax on property itself.

Section 1 of the act, no doubt, levies an occupation tax on the business of fur-trading. It provides:

“The license fee for each license shall be ten dollars (\$10) for the business of fur-farming twenty-five dollars (\$25) for stationary fur-buyers, and one hundred and fifty dollars (\$150) for itinerant fur-buyers, * * * ”

Section 2 providing for the character of the license, requires that it must contain an agreement that the licensee will, at the end of the license year, remit to the Commissioner “the tax due upon *the pelts handled* as herein provided.” (Italics ours.)

Section 3 then provides:

“In addition to the license fee above provided for the licensee shall pay to the Commissioner who issued the license the following license fees *on each pelt taken* by a fur-farmer or purchased or otherwise acquired by a fur buyer or taken by a trapper and not sold to a licensed fur buyer * * * ” (Italics ours.)

This section contains the only language in the act characterizing the tax as a license. Section 2 refers to the payment of “*the tax due on the pelts*”. Section 4 speaks of the “*remittance of the tax upon the pelts handled*”. All the other provisions of the act show it to be levied on the property and not on the privilege of carrying on the business of fur trading. Section 5 requires the Commissioner to issue receipts for “all licenses *and* taxes collected,” and also uses the phrase “*license tax on pelts*” and again speaks of “receipts in duplicate for all licenses *and*

taxes collected.” Section 9 requiring the licensees to keep records of furs taken, says, “Such records shall show the species of each pelt with sufficient distinctness to determine the *tax payable thereon.*” Section 11 provides for a lien upon the “*pelts on which the tax accrues.*” Section 15 refers to “*any pelt on which the tax has not been paid.*”

The foregoing references should be sufficient in themselves to show that the impositions in Section 3 are not placed on the business of fur-trading, but on the furs—the property. In six different places in the act they are characterized as taxes due on the *pelts*—not on the business or the privilege of doing business. Nowhere in the act are they characterized as taxes on the privilege or doing business as a fur-trader. They are uniformly referred to as taxes “on the pelts”. Section 1 and Section 2 cover the payment for and issue of the license to fur traders. Section 3 places a tax on pelts. And twice in Section 5 this construction is borne out by the use of the phrase “*licenses and taxes collected.*” (Cf. the language in *State v. Bengsch*, ante.)

It is significant, too, that Section 11 makes the tax a lien on the pelts on which the tax accrues, an universal characteristic of a property tax. *Thompson v. McLeod*, 73 So. (Miss.) 193, 194.

It has been suggested that the sums imposed in Section 3 merely measure the quantum of the tax that is to be paid for the privilege of doing business. But such is not the language of the act. The ref-

erences just made to the recitals in the act clearly indicate this. Section 2 provides for the actual issuance of the license upon the agreement of the licensee to pay the "*tax due on the pelts handled*" not on the privilege or license. In the second place the arbitrary amounts assessed on each variety of pelt taken, irrespective of its actual value or the use to which it subsequently is put, palpably are not intended to measure the quantum. It is true it varies with the number of furs purchased, but there the relation ends. It has no connection with the actual value paid; it is assessed irrespective of whether the furs are sold or are used for other purposes; it has no regard to the sale price which the pelts bring when sold, and hence only in the most remote way indicates the actual volume and value of business transacted.

"Taxes upon the aggregate purchases of a merchant, the gross receipts of a business, or the premiums received by an insurance company are business taxes; but bonuses given for corporate franchises or taxes upon the capital stock of corporations are not." 21 Amer. & Eng. Encyc. Law 775.

A tax on aggregate purchases is a tax on the amount actually paid out for their purchase, a factor that has some direct relation to the business as conducted. The same is true of gross receipts. On the other hand, a fixed amount exacted for every article bought by the licensee without any relation to the value of the article to the business, is essen-

tially arbitrary and is itself evidence of an intention to tax the article and not the business.

Finally it is to be noted that no license is required of trappers in Section 1, but in Section 3 it is provided that they must pay a tax on such pelts as have been acquired but have not been sold to a licensed fur buyer. What clearer demonstration of this tax as a property tax could be made? The act purports to levy a license tax on the business of trapping, yet in Section 3, the trapper avoids the tax if he has transferred the pelts to a licensed fur buyer. Thus it is plainly seen that the intent of the legislature was to levy a tax on the pelts, whosoever may own them, and not on the business of trapping.

Throughout the entire act the pelt itself is looked to as the subject of and the security for the tax no matter in whose hands it may be. Section 3 of the act clearly shows that the legislature has levied a tax on property and the authorities support this conclusion.

The following statement in *Ruling Case Law* aptly fits the case under consideration:

“A tax on the ownership of property, whatever it may be called, is a property tax. A tax on a thing is a tax on all of its essential attributes, and a tax on an essential attribute of a thing is a tax on a thing itself; so that a tax on a thing owned is necessarily a tax on the right of ownership thereof, and a tax on the ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed

which does not include the right of ownership, consequently, no tax can be imposed upon the right of ownership which is not also a tax on property. It follows that a tax on the attributes of ownership, or on the right to make the only use of property for which it is of any value, is a tax on the property itself. Thus a tax on the sale of an article imported only for sale, is a tax on the article itself. It is for this reason that it is held that a tax upon the income of real or personal property is in effect a tax upon the property itself, although a tax on the gross receipts, or on the income from a business, trade, profession, or employment, is an excise tax." 26 R. C. L. 36.

The principles just set forth are applied in the following authorities:

"A tax on a merchant's, manufacturer's or miner's gross sales is not the same thing as one on his stock treated as property."

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292; 59 L. Ed. 234, 238.

Livingston v. Albany, 41 Ga. 22. A tax of one dollar was imposed on each and every horse or mule offered and sold within the City of Albany by or belonging to horse or mule drovers. The court said, in holding that the law violated the uniformity provision of the constitution, similar to Section 9 of the Alaskan organic law:

"A tax upon the sale of horses or mules, or upon horses or mules sold, is a tax on property * * *. A tax of a certain sum on each horse or mule sold, is not an ad valorem tax as one of these animals may be worth \$100 or another

\$500.” (Followed in *Kenny v. Harwell*, 42 Ga. 416.)

City of Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387. The city levied a license tax on merchants for the right to do business of 1% of the value of merchandise on hand or to be kept on hand for the year, to be paid annually. The ordinance also required the issuance of a license at a cost of fifty cents. Holding that the tax was on property, the court said:

“After a careful investigation of the questions mooted and most ably discussed by counsel, it seems palpable that this is a ‘property tax’ pure and simple. It is an obvious misnomer to call it a ‘tax upon occupation.’ While cities of the third class may exact a license tax upon occupations or callings, the tax thus enacted must be upon the privilege itself, and not a plain ad valorem tax upon property as this ordinance levies.” (Followed in *State v. Stephens*, 48 S. W. (Mo.) 929, 935.)

The language of the Tooey case was most forcefully emphasized in *State v. Bengsch*, 70 S. W. (Mo.) 710, 721, which involved a tax of an arbitrary amount on certain measures of intoxicating liquors sold. In his specially concurring opinion, Valiant J. said, referring to the Tooey case:

“That was not a liquor traffic license, and therefore all that is said in that case may not be applicable here; but it is to this extent applicable, viz: The court is not bound by mere form of expression used in the act, if the purpose is otherwise manifest,—is not bound to ad-

judge it to be a license tax merely because it is so named, if, on the whole act it clearly appears to be a property tax, which, in my judgment, this is."

The same justice further said in reference to the particular act under discussion:

"It is argued that the imposition of a high license tax is in itself a form of police regulation. That is so when it is imposed on the privilege to do business, but, when the law prescribes conditions as prerequisite to the right to do the business, then, when those conditions have all been satisfied, the property employed in the business is subject to taxation only as required in Article 10 of the constitution."

Smith v. Court of County Commissioners, 23 So. (Ala.) 141. A tax of one dollar was levied on each vehicle as a prerequisite to the right to use the roads. The court held:

"It is plainly and unequivocally a tax on property and the sum of the tax laid upon all vehicles in a given class is the same without regard to the value of the vehicle."

See also *Sims v. Jackson*, 22 La. Ann. 440.

Pittsburgh, C. & St. L. Ry. Co. v. State, 30 N. E. (Ohio), 435 involved a "fee" of one dollar per mile levied on railroad tracks.

"The statute calls it a fee, but its nature is not affected by the name that may be assigned to it. It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum levied upon all the farmers of the state for each

acre of land of which they may be seized, or each head of horses or other live stock that they may own. In both instances the tax is levied upon property, but it is neither levied 'according to its true value in money' nor uniformly upon all property, both of which are constitutional requirements."

Thompson v. McLeod, 73 So. (Miss.) 193, is of particular interest, since its facts are substantially the same as in the instant case.

"The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted and commonly known as 'crude'; but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees to 'extract turpentine from standing trees.' Section 1 of the act makes no effort to conceal the subject matter of the tax. It expressly declares that it is 'levied on the gross annual cutting or extraction,' and the tax levied is 'one fourth of one cent each year for each cup or box.' It is true the act in other language refers to it as a business—'a business of extracting turpentine from standing trees.' The imposition of such a tax is not on a business, but on the property involved. Here we have a citizen of our state who owns and operates his own turpentine distilleries, who owns the pine trees which produce the resin, the crude product without which his distilleries cannot be operated, and although he pays ad valorem taxes upon his land and standing trees at their true value, and although he pays a privilege tax for the right to manufacture spirits of turpentine from the annual product of the trees, he is now called upon to pay an additional tax of one fourth of one cent on each box cut or chopped on the trees, and it requires no refinement to observe at once that

this is an additional burden or taxation operating, not indirectly, but directly upon complainant's property."

The tax on furs here involved is the same as the tax on each mule or horse sold in the Livingston case, *supra*; the same as the tax on the stock of the merchant in the Tooey case, *supra*; the same as the tax on the liquor sold in the Bengsch case; the same as the tax on vehicles in the Smith case; the same as the tax on railroad track in the Pittsburgh case; the same as the tax on the cups in *Thompson v-McLeod*—all were taxes on the property and not on the privilege of conducting the business.

VIII.

PRIOR DECISIONS INVOLVING ALASKAN LICENSE TAXES.

This honorable court has on previous occasions had to deal with license taxes imposed by the Territorial Legislature. The most important of these are:

Alaska Pacific Fisheries v. Alaska, 236 Fed. 52;

Hoonah Packing Co. v. Alaska, 236 Fed. 61;

Alaska Salmon Co. v. Alaska, 236 Fed. 62;

Alaska Mexican Gold Mining Co. v. Alaska, 236 Fed. 64;

Alaska Pacific Fisheries v. Alaska, 236 Fed. 70.

The taxes involved in all of these cases were held valid notwithstanding Section 9 of the organic act. An examination of them, however, will show that all of the impositions were considered true business taxes, levied on the privilege of doing business and not on the property of the licensee. None were comparable in character or effect with that imposed in Section 3 of the act here considered.

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52.

This is the case upon which defendant in error chiefly relies. The plaintiff in error in that case was sued by the territory for moneys alleged to be due for prosecuting the business of fishing with fish traps in the waters of Alaska. The act in question imposed a license tax for respective lines of business, among others, "Fish traps: Fixed or floating, one hundred dollars per annum. So called dummy traps included." The principal point in the case was whether or not the territory had power to impose a license tax for revenue. The court held that the territory had such power. It was also contended by plaintiff in error that the legislature did not have reference to the business of fishing with fish traps, because dummy traps were included, and since dummy traps cannot be used in fishing, it was urged that the legislature intended to place a specific property tax on fish traps regardless of whether they were used in catching fish or not. The court held that the inclusion of dummy traps in the

business of fishing with fish traps showed no intent to tax fish traps as property inasmuch as dummy traps may be said to be incidental to the business of fishing with fish traps. The court conceded that if the true construction of the act was that it imposed a tax upon the property used in the business of fishing it would be void. It was held in that case that carrying on the line of business of fish traps in Alaska is understood to be fishing with fish traps, hence the act showed no intent to tax fish traps as property rather than to tax the business of fishing with fish traps.

In the instant case we have shown that in Section 3 of the act under consideration no legislative intent is manifested to tax the business of fur farming, trapping and trading in pelts, since trappers who have sold their pelts to a licensed fur buyer need not pay the tax. If the tax were on the business of trapping the fact that the trapper had sold his pelts would not relieve him from the burden of paying the tax. The legislature doubtless intended that pelts which had been sold to a licensed fur buyer would be taxed to the latter, and not wishing to tax the same property twice, relieved the trapper of paying the tax on the pelts so sold, thus confirming the hypothesis of an intent to tax the property itself. We therefore distinguish the instant case from the Alaska Pacific Fisheries case upon the ground that in the former case a clear legislative intent to tax the property, i. e., the pelts, appears whereas in the

latter case the intent to tax the business of fishing with fish traps was manifested.

The Hoonah case, *supra*, was decided on the authority of the Pacific Fisheries case just discussed without opinion.

The Alaska Salmon Co. case involved a tax imposed by the territorial legislature measured by the output of the canneries which in effect duplicated a similar Congressional tax but which the court held was none the less valid. No contention was made that what purported to be a license tax was in fact a property tax. It must be noted, too, that this was an output tax, which is entirely different from the tax here in question. Furthermore, the act imposing the tax recited that the licensees should "pay for said license for the respective lines of business and trades, as follows, etc." specifically making it a license tax and not terming it a tax on the goods.

The second Alaska Pacific Fisheries case decided that there was civil liability for the tax, that the act was definite enough to be enforced, and that it could be enforced although the same subject was covered by a Congressional enactment.

The Gold Mining Co. case involved a license tax measured by a per centage of gross receipts, a standard that has been universally approved and which is strikingly different from that imposed in Section 3 of the act of 1921.

The only other case that merits consideration in this connection is that of *Alaska Fish Salting & By-*

Products Co. v. Smith, 255 U. S. 44, 65 L. Ed. 489, which was relied upon by the learned trial judge in his written opinion overruling the demurrer of plaintiff in error. This case involved a tax of \$2 a barrel and \$2 a ton respectively, upon persons manufacturing fish oil, fertilizer, and fish meal in whole or in part from herring. The court held very briefly that this was not a property tax, following the opinion in *Alaska Pacific Fisheries v. Alaska*, supra. This case again involved an output tax, or a tax on manufactured articles, which we have already shown to be very different from that considered in this appeal.

Each of the foregoing cases is further to be distinguished in the following respects:

1. A license fee was not first exacted, the issuance of a license provided for and then an additional so-called license tax exacted.
2. The legislative acts involved did not themselves characterize the taxes as being levied specifically on the property.

IX.

BEING A TAX ON PROPERTY, IT IS VOID UNDER SECTION 9 OF THE ORGANIC ACT.

Having shown that the tax in question is in fact one on property it should need no argument to show that it is void under the provisions of Section 9 of

the Organic Act, since it is neither assessed according to value nor uniformly.

Livingston v. Albany, supra.

Smith v. County Commissioners, supra;

P. C. & S. L. Ry. Co. v. State, supra.

X.

THE ACT IS VOID SINCE IT EMBRACES MORE THAN ONE SUBJECT AND SINCE THE SUBJECT IS NOT EXPRESSED IN THE TITLE.

If the contention of the plaintiff in error above made that the provisions of Section 3 impose a property tax is correct, the act is necessarily void since Section 1 imposes a license tax which alone is set out in its title.

“No law shall embrace more than one subject, which shall be expressed in its title.”

(Section 8 of the Organic Act, 37 Stat. L. 514, 1 Fed. Stats. Ann. 255.)

CONCLUSION.

In the Pacific Fisheries case, this court decided that despite the provisions of Section 9 of the Organic act requiring that all taxes be levied uniformly according to value, the Territory has power to impose license taxes for revenue. If this power is not to be abused, if property throughout Alaska is

not to be burdened with taxes irrespective of its value, taxes purporting to be levied on privileges must be carefully scrutinized to determine their actual character and effect. Otherwise, the limitations and safeguards set up in Section 9 of the Organic act will be nullified. Indeed, the attorney-general will concede that no taxes are levied and collected in Alaska in accordance with the provisions of Section 9 of the Organic act. All revenue is supplied by excise taxes. A careful definition of license taxes as distinguished from property taxes, must, therefore, be found and effectively applied.

As we have endeavored to show, this distinction rests upon the determination of whether the tax is in fact placed upon property or upon the privilege. This in turn must depend upon the language of the act itself and upon its necessary effect as well.

We have shown on behalf of plaintiff in error that the act itself in unmistakable terms places the tax "on the pelts", and not on the privilege of fur-trading. We have shown that the necessary effect of the act is to tax the pelts and not the privilege—that not only has the tax no relation to the privilege of fur-trading, but that it is levied on the "pelts" handled irrespective of whose hands deal with them. The trapper's "business" may escape taxation entirely. These considerations inevitably lead to the conclusion that the tax is on the property, and not on the business as such.

It, therefore, is submitted that to secure to plaintiff in error the protection vouchsafed it in Section 9 of the Organic Act the tax should be held a property tax, and the judgment should be reversed.

Dated, San Francisco,

February 10, 1923.

Respectfully submitted,

JOHN A. CLARK,

SLOSS, ACKERMAN & BRADLEY,

Attorneys for Plaintiff in Error.

No. 3959

IN THE 2

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COMPANY OF
ALASKA (a corporation),

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Brief for Defendant in Error

JOHN RUSTGARD,

Attorney General of Alaska,

Attorney for Defendant in Error.

FILED

MAR 2 - 1900

U. S. DISTRICT COURT

No. 3959

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COMPANY OF ALASKA (a corporation), vs. TERRITORY OF ALASKA,	}	<i>Plaintiff in Error,</i> <i>Defendant in Error.</i>
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BRIEF FOR DEFENDANT IN ERROR.

Very little needs be added to what the learned court below said in his opinion in this case. There are many decisions on record supporting the views of plaintiff in error, but all of these, save one, were submitted to this tribunal and to the Supreme Court in previous appeals from Alaska. The one new case, Thompson vs. McLeod, was disposed of by the lower court in his opinion, and will not be further discussed at this time.

Counsel concede that if the statute had referred to the "tax *for* the pelts" instead of "tax *on* the pelts" the law would be valid.

Their logic sounds somewhat antiquated. The time has passed when courts can be made to stumble over mere words. It has been discovered that what applies to the interpretation of scripture equally applies to the interpretation of a statute: "The letter killeth, but the spirit maketh whole."

There is no difference in *principle* between the statute here in question and those statutes considered in the former adjudications by this and the Supreme Court. Indeed, there is not much difference in language.

In the Acts of 1913, 1915 and 1917, held valid by this court, the tax was "4½ cents per case *on* Kings, Reds or Sockeyes; 2½ cents per case *on* Medium Reds, and 2 cents per case *on* all others. * * * 2½ cents per hundred pounds *on* all fish salted or mild cured. * * * Oil \$2.00 *per* barrel, and fertilizer \$2.00 *per* ton."

The distinction which counsel endeavors to draw between the statute here under consideration and those statutes formerly construed by this court does not exist as a matter of fact, but even if that distinction did exist it were purely technical and would not involve the principle. The statute as a whole and not segregated phrases must be construed. When this is done it becomes obvious that the tax is on the business and not on the property: The title of the act declares it a license tax upon the business. The first section provides that no one shall engage in the business unless he has a license, and Section 2 provides that no one shall receive a license unless he agrees in writing to pay the tax upon the pelts handled. The fact that the word "upon" instead of the word "for" is used in the last clause surely does

not change the spirit, purpose or meaning of the law.

The identical question raised by learned counsel was recently passed upon by the Supreme Court of Oregon in the case of *Re Inman*, 199 Pacific 615 (620). That decision involved an inheritance tax, but the question was whether or not the tax, by the wording of that statute, became a property tax. The Court said:

“Although, as previously explained, language may be found in our inheritance tax act as in most of the inheritance tax statutes, such as ‘tax on estates,’ ‘tax levied on such estates,’ property ‘shall be subject to a tax,’ and the like; yet our statute, when construed in its entirety, provides for a tax which is plainly and indisputably a perfect example of an inheritance tax. The tax is on the right to receive; but the amount of the tax laid upon such right is measured by the value of the property to which the right attaches.”

It is next contended that because the fur tax act makes the ~~act~~^{tax} a lien upon the furs it makes the whole system property tax. It will be observed that this is no new feature. It was taken from the former acts. The tax law of 1915, held good by this court, provides:

“All taxes levied, laid or provided for in this act and penalties and interest accrued are hereby declared a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments.”

Except for this feature, the tax, especially against itinerant buyers, could not be enforced.

Obviously the tax in question is not upon the furs but upon the privilege of dealing in furs. The amount of this tax is based upon the character of the pelts and to that extent based upon the value and amount of the transaction.

As was aptly stated by Mr. Justice Holmes in *New York Trust Company vs. Eisner*, 256 U. S. 345, in dealing with a somewhat similar question arising under the inheritance tax laws of Massachusetts:

“Upon this point a page of history is worth a volume of logic.”

The question in the last named case, as well as in *Knowlton vs. Moore*, 178 U. S. 41, and *Scholey vs. Rew*, 23 Wallace 331, was whether or not ^{an} ~~on~~ inheritance tax or succession tax based upon the value of property and made a lien thereon was a property tax. In each case the court held it was not.

In the last named case the Supreme Court says:

“Nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land as the lien is merely an appropriate regulation to secure the collection of the exaction.”

It may be pardonable to again quote from the Supreme Court of Oregon:

“Nor is such tax necessarily made a direct tax on property merely because the statute provides for a lien upon the property and requires payment by the executor or administrator, as such provisions are nothing more than appropriate regulations to secure the collection of

the tax. Although in our state statute, as in many inheritance tax statutes, language may be found referring to 'rate of tax on all estates' and 'taxes levied on such estates,' and the like, this language does not of itself make the tax a direct property tax. The value of the property is used merely as a measure of the amount of the tax to be paid and the property is then looked to for the purpose of insuring payment, just as in a multitude of instances property is looked to for the purpose of insuring payment of debts due private persons." In re Inman, *supra*, 619.

It will thus be observed that the decision of the lower court is supported both by reason and by authority.

Respectfully submitted,

JOHN RUSTGARD,

Attorney General of Alaska,

Attorney for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and
JOHN L. McLEAN, as Trustee in Bankruptcy
of PATTERSON-MacDONALD SHIPBUILDING
COMPANY, a Corporation, Bankrupt,
Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Western District
of Washington, Northern Division,
and Transcript of Record in
Support Thereof.

FILED

JAN 19 1923

F. D. MONOKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt.
COMMONWEALTH OF AUSTRALIA,

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United States Circuit Court of Appeals for the
Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES
FOWLER and JOHN L. McLEAN, as Trus-
tee in Bankruptcy of PATTERSON-Mac-
DONALD SHIPBUILDING COMPANY, a
Corporation, Bankrupt,

Respondents.

Petition for Review of Commonwealth of Australia.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of the Commonwealth of Australia
respectfully shows unto the Court:

I.

That upon March 19, 1920, an order was duly
entered in the United States District Court for the
Western District of Washington, Northern Divi-
sion, adjudging Patterson-MacDonald Shipbuilding
Company, a corporation, Bankrupt, upon its volun-
tary petition for such an order and upon the said
day the matter of the said bankruptcy was referred
to the Honorable Cicero R. Hawkins, Referee in
Bankruptcy, and thereafter on April 2, 1920, at

the first meeting of creditors of the said bankrupt duly called and held before the said referee, [1*] John L. MacLean was duly elected trustee of the said bankrupt, and thereafter duly qualified as such and ever since has been and is now the duly authorized and acting trustee for said bankrupt.

II.

That thereafter, on the 31st day of July, 1920, Mark Sheldon, as Commissioner for the Commonwealth of Australia, for and on behalf of this petitioner, presented and filed with the said referee a claim of this petitioner against the said bankrupt, in a sum in excess of \$1,000,000. That upon objections made to the said claim by the trustee, the said claim has been by the District Court disallowed, but an appeal from the said order of disallowance is now pending in this court, and according to the present knowledge and advice of this petitioner, this petitioner has a valid claim against the said bankrupt for a sum in excess of \$1,000,000 and the total of all other approved and unpaid claims against the said bankrupt is less than \$70,000.

III.

That subsequent to the filing of this petitioner's claim, the said trustee filed objections thereto, and thereupon on October 12, 1920, an order was entered in the said District Court in the said bankruptcy proceedings, wherein it was ordered as follows, to wit:

“That C. R. Hawkins be and he hereby is appointed a special master in chancery to take

*Page-number appearing at foot of page of original certified Transcript of Record.

evidence and make findings upon the questions arising out of the proof of secured claim filed by Mark Sheldon as Commissioner for the Commonwealth of Australia in the United States of America, and the objections thereto by the trustee in bankruptcy, and submit his findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy.” [2]

IV.

That thereafter the said claim and the objections thereto came duly on for hearing before the said C. R. Hawkins, sitting as special master pursuant to the said order of October 12, 1920, and while the said hearing was in progress the said trustee, instead of presenting to the said master his claims for offsets against the claim of this petitioner, asserted the right to have such claims arbitrated pursuant to a clause which was contained in the contract which formed the basis of this petitioner's claim, the said clause being known as paragraph 18 of said contract, and providing in substance that if any question should arise between the said bankrupt and this petitioner as to the said contract, or the ships, or the right of either party that could not be adjusted by the parties under the said contract, then the said question should be settled and adjusted by arbitration in Seattle, Washington, and the said bankrupt should choose an arbitrator and this petitioner should choose an arbitrator, and the two thus chosen should choose a third and a decision of the majority of the board so constituted to be final. Thereupon the said trustee without any

compliance, substantial or at all, with §26 of the Bankruptcy Act and Rule 33 of the Bankruptcy Rules, appointed said respondent Frank E. Burns to act as arbitrator for him pursuant to said paragraph 18, and the said respondent Burns in conjunction with one Frank Walker acting as arbitrator appointed by this petitioner, appointed the said respondent W. C. Dawson.

V.

That thereafter there was presented and filed with the said master, a paper purporting to be an award by the said Frank E. Burns, W. C. Dawson and Frank Walker, finding in favor of the said trustee in the sum of \$1,028,458.66. [3]

VI.

That the said award was approved by the said master and subsequently by the district Judge, but its force and validity are now pending in this court upon the appeal of this petitioner from the order of the said district court denying this petitioner's claim.

VII.

That there was also filed and presented to the said master another paper purporting to be an award in arbitration by one James Fowler, which recited that he had been appointed by this petitioner and the said trustee to arbitrate certain questions which the said award purported to determine.

VIII.

That thereafter at a meeting of the creditors of the said bankrupt, held on August 31, 1921, there were presented at the said meeting claims from the

said James Fowler in the sum of \$500.00, Frank E. Burns in the sum of \$3,000.00, and W. C. Dawson in the sum of \$1500.00, for services as arbitrators as aforesaid.

IX.

That at said meeting of the creditors and while the said claims were being considered, this petitioner objected thereto upon the grounds that the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court in compliance with section 26 of the Bankruptcy Act and Rule 33 of the Bankruptcy Rules, and that there had been no compliance with the said section 26 of the Bankruptcy Act or Rule 33 of the Bankruptcy Rules, either substantially or at all, and that the employment of the said arbitrators was contrary to the express directions contained in the said order entered in the said District Court of October 12, 1920, appointing a special master to take evidence and make findings upon [4] the question of this petitioner's claim and the objections thereto, but that in spite of this petitioner's objection, the said referee made an order allowing the said claims and ordering payment thereof.

X.

That thereafter this petitioner duly filed its petition for review of the said order, in which petition for review this petitioner claimed that the said ruling and order of the referee was erroneous for the following reasons:

1. That the said trustee had no power or author-

ity to employ arbitrators without the express order and direction of the bankruptcy court.

2. No order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

3. The submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other Court or board of arbitrators was contrary to the express directions contained in the above-mentioned order appointing a special master to pass upon the said claim.

4. The awards of the said arbitrators are void upon their face.

5. The said arbitrators have rendered no beneficial service to the said trustee for the reason that the said awards have not yet been approved by this Court, but will be found by this Court upon objections which have been offered thereto by this petitioner to be void and of no force and effect.

XI.

That thereafter the said referee duly filed his certificate on review in the office of the clerk of the said District Court [5] and thereafter on the 26th day of October, 1922, the said Court entered its order upon the said petition for review, denying the said petition and approving, confirming and sustaining the said order of the referee in every respect, to which order this petitioner took due and proper exception.

XII.

Your petitioner further shows that it is aggrieved

by the said orders of the said District Court and injured thereby, and that the errors complained of consist of the following:

First: The Court erred in not sustaining the objections of the petitioner to the order of the said referee on the ground that the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

Second: The Court erred in not sustaining the objections of this petitioner to the said order of the said referee on the ground that no order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

Third: The Court erred in not sustaining the objections of this petitioner to said order of the said referee on the ground that the submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the order of this Court appointing a special master to pass upon the said claim.

Fourth: The Court erred in not sustaining the objections of this petitioner to said order of the said referee on the ground that the awards of the said arbitrators are void upon their face.

Fifth: The Court erred in not sustaining the objection of this petitioner to said order of the said referee on the ground [6] that the said arbitra-

tors have rendered no beneficial service to the said trustee.

Sixth: The Court erred in approving the order of the referee ordering payment to the said F. E. Burns in the sum of \$3000.00, and to the said W. C. Dawson in the sum of \$1500.00, and to the said James Fowler in the sum of \$500.00.

XII.

Your petitioner further shows that the said trustee and his attorneys have throughout the said proceedings favored and advocated the payment of the said claims and the attorneys for the said trustee appeared upon the hearing before the said District Court in support of the said order of the said referee and in opposition to this petitioner's petition for review, so that it would be a useless formality to ask the said trustee to petition this court to revise the said order entered in the said District Court.

WHEREFORE, your petitioner prays that the said order, judgment and decree of the said District Court be reviewed and revised in the matters of law and that it be adjudged by this court that the said orders of the District Court and of the referee be reversed and that the said F. E. Burns, W. C. Dawson and James Fowler take nothing by their claims.

COMMONWEALTH OF AUSTRALIA,

By CORWIN S. SHANK,

Its Attorney. [7]

United States of America,
State of Washington,
County of King,—ss.

Corwin S. Shank, being first duly sworn, on oath, deposes and says: That he is the attorney of the Commonwealth of Australia in the foregoing action and signed the foregoing petition on behalf of the said petitioner, being duly authorized thereto, and that he has read the foregoing petition, and makes oath that the statements contained therein are true as he verily believes.

[Seal]

CORWIN S. SHANK.

Subscribed and sworn to before me this 21st day of December, 1922.

H. C. BELT,

Notary Public in and for the State of Washington,
Residing at Seattle. [8]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

**Order Appointing C. R. Hawkins Special Master in
Chancery.**

Upon the stipulation of the attorneys for the

trustee in bankruptcy and of the attorneys for Mark Sheldon, as commissioner for the Commonwealth of Australia in the United States of America, it is hereby

ORDERED that C. R. Hawkins be and he hereby is appointed a special master in chancery to take evidence and make findings upon the questions arising out of the proof of secured claim filed by Mark Sheldon, as commissioner for the Commonwealth of Australia in the United States of America, and the objections thereto by the trustee in bankruptcy and submit his findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy.

Done in open court this 12 day of October, 1920.

JEREMIAH NETERER,

Judge.

O. K.—BRONSON, ROBINSON & JONES,

Attys. for Trustee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 12, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [9]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Referee's Certificate on the Petition for Review of
Mark Sheldon as Commissioner for the Com-
monwealth of Australia in the United States
of America.**

To Honorable JEREMIAH NETERER, Judge of
the Above-entitled Court:

I, C. R. Hawkins, one of the referees of said
court in bankruptcy, do hereby certify that during
the course of the proceedings in said cause before
me, to wit, on the 7th day of September, 1921, the
trustee filed herein his report and petition in which,
among other things, he reports as follows, to wit:

“In the controversy between the trustee and
the Australian Government, pending before
Hon. C. R. Hawkins as Special Master in Chan-
cery, there have been two matters submitted to
arbitration. One of these was a dispute as to
who should pay the cost of certain stores and
equipment amounting to approximately \$109,-
000 which it was agreed by the parties in their
contract of March 31, 1919, should be submitted
to James Fowler of Seattle for determination.
This matter was duly submitted to James
Fowler, and considered by him, and an
award was made, finding that the bank-
rupt should stand approximately \$43,000,
and the Australian Government approximately
\$75,000 of the cost of such items in dis-
pute. Mr. Fowler has now submitted to your
trustee his bill for services as arbitrator in this
connection in the sum of \$1000, and your trus-

tee believes that this is a reasonable sum for the services of the arbitrator in this connection, and your trustee should be authorized and directed to pay one-half of said amount, as the trustee's share of said expense.

The other matter submitted to arbitration was that of the bankrupt's claim for allowance from the Australian Government on account of work and materials furnished extra to its contract, involving matters in dispute of approximately \$1,114,944.40, which question was referred to a board of arbitrators consisting of Frank Walker, selected by the Australian Government, Frank E. Burns, selected by the Trustee, and W. C. Dawson, selected by the said [10] Walker and Burns. These arbitrators held numerous and lengthy hearings, examined a great amount of evidence, and considered the case very thoroughly, and have made an award finding that the bankrupt is entitled to an allowance from the Australian Government for work done and materials furnished extra to its contract, in the sum of \$1,028,458.66. Under the arrangement for selection of these arbitrators and holding of this arbitration, the trustee should pay the fees of Frank E. Burns, the arbitrator selected by him, and one-half of the fees of W. C. Dawson, the third member of the board; that said Frank E. Burns and W. C. Dawson have submitted bills for said service in the sum of \$3000 each, and your trustee believes that said charges are fair and reasonable, and

that he should be authorized and directed to pay the bill of the said Burns, and one-half of the bill of the said Dawson,”

and in said petition asks that a creditors' meeting be called to consider and act upon the matters set out in said report.

Pursuant to said petition an order was made calling a meeting of creditors to be held on the 23d day of September, 1921, and notice of said meeting of creditors was mailed to all the creditors and parties in interest as is required by law; that among other things contained in said notice was the following:

“You are further NOTIFIED that the trustee reports that James Fowler, an arbitrator named in the contract between the Australian Government and the bankrupt corporation, has submitted his bill for services as such arbitrator in the sum of \$1000.00, one-half of which is chargeable against the bankrupt and the trustee recommends the payment thereof, also that Frank E. Burns, selected by the trustee and W. C. Dawson selected as the third man in the arbitration of the bankrupt's claim for allowance against the Australian Government on account of work and material furnished extra to its contract, have submitted bills for said services in the sum of \$3000.00 each. The service of Frank E. Burns is chargeable to the trustee and one-half of the service of W. C. Dawson is chargeable to the trustee. The trustee recommends the payment of the bills for such services as submitted.”

That at said meeting of creditors, upon the consideration of the matter of the allowances of compensation to the arbitrators mentioned in the trustee's report and petition and in the notice mailed to creditors, an objection was made on behalf of Mark [11] Sheldon as Commissioner of the Commonwealth of Australia in the United States of America, the Martin General Agency and Aero Alarm Co. on the ground that no compensation whatever could properly be allowed to said arbitrators out of the estate of the bankrupt. No objection whatever was made to the amount of the allowance asked for by said arbitrators and recommended by the trustee, and upon inquiry by the referee it was expressly stated by Mr Shank, representing the Commonwealth of Australia, that he considered the amounts asked for by the respective arbitrators and recommended by the trustee, reasonable if any compensation was to be allowed, but that it was his contention that no allowances could be made to said arbitrators out of the estate of the bankrupt.

After due consideration of the objections made, it was announced by the referee that allowances would be made to each of said arbitrators in the sum recommended by the trustee, and subsequently thereto, on the 21st day of October, 1921, an order was made, subject to the approval of the Judge of this court, authorizing and directing the trustee to pay to James Fowler, one-half of his bill for services rendered as arbitrator in the matter submitted to him for arbitration in the sum of \$500.00; to

F. E. Burns for his services as arbitrator in the matter submitted to him, W. C. Dawson and Frank Walker, the whole amount of his bill in the sum of \$3000.00, and to W. C. Dawson, one of the arbitrators in said matter, one-half of his bill for services in said arbitration in the sum of \$1500.00.

The said Commissioner for the Commonwealth of Australia, feeling aggrieved at said order, filed his petition herein for a review of said order, which was granted.

The only questions presented for review are:

First. Whether James Fowler, who was selected and named as an arbitrator of certain questions in dispute between the parties in this controversy, by said parties [12] themselves, by an agreement dated March 31st, 1919, having performed the services required of him as said arbitrator, is entitled to a reasonable compensation therefor, and whether the trustee in bankruptcy may properly be authorized and directed to pay from the funds of the estate one-half thereof.

Second. Whether Frank E. Burns, selected as an arbitrator by the trustee in bankruptcy, and W. C. Dawson, selected as the third man on the Board of Arbitrators by said Frank E. Burns and Frank Walker, the arbitrator selected by said Commissioner of the Australian Government, to arbitrate certain questions in dispute between said parties as is more fully set out in the findings contained in the order complained of herein, having performed the services required of them, are entitled to reasonable compensation therefor, and whether the

trustee in bankruptcy may properly be authorized and directed to pay the entire sum found to be a reasonable compensation for the services of said Burns and one-half of the sum found to be a reasonable compensation for the services rendered by said Dawson, out of the funds belonging to said estate.

It was the contention of the Australian Government before me, at said meeting of creditors, that the arbitrator James Fowler was not legally authorized to act as such arbitrator and make an award on the questions submitted to him and for that reason no allowance of compensation whatever could be made for his services, notwithstanding the fact that both parties to the controversy availed themselves of his services as such arbitrator, appeared before him, submitted evidence and participated in the proceedings until the final conclusion and award.

For like reasons it was urged by said Commissioner of the Australian Government that no allowance whatever could be made to the arbitrators, Burns and Dawson, notwithstanding the fact that said Commissioner of the Australian Government, by Mr. Shank, his attorney, selected Mr. Frank Walker, one of the arbitrators in said matter, who, together with Mr. Burns, selected by the trustee, proceeded to name W. C. Dawson on the board, as was provided by the contract between the parties, and after said board was organized both parties availed themselves of the services of said board, appeared before them, submitted evidence and participated in the proceedings throughout the inquiry

until the said award of said [13] arbitrators was made and submitted.

The facts which are pertinent to a review of the questions presented are contained in the order complained of.

I was of the opinion that under all the facts of this case that the respective arbitrators having performed the services for which they were selected and employed were entitled to a reasonable compensation for the services rendered, and as it appeared that the trustee and creditors were all of the opinion that the amount asked for by the respective arbitrators was only a fair and reasonable compensation for the services rendered, the order complained of was made.

I hand up herewith as the record in this case:

1. The order complained of, in which is set out all the facts material to the issues raised.

2. The petition for review.

Dated at Seattle, in said District, this 28th day of December, 1921.

Respectfully submitted,

C. R. HAWKINS,

Referee in Bankruptcy. [14]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

Order for Disbursement.

This matter coming on for hearing at a creditors' meeting duly held upon the 23d day of September, 1921, at 1204 L. C. Smith Building, Seattle, Washington, at the hour of two o'clock P. M., and adjournments thereof, upon trustee's report and petition for authority to pay to James Fowler the sum of \$500, to F. E. Burns, the sum of \$3000, and to W. C. Dawson, the sum of \$1,500, for and on account of services rendered the trustee and the estate of the above-named bankrupt, and it appearing that by a certain agreement dated March 31, 1919, entered into between the Australian Government and the bankrupt, it was provided that certain questions of stores and equipment in dispute between the parties, and the matter of which of the parties should pay for the same, should be decided by reference to the said James Fowler, and that said matters and questions, involving items in dispute amounting to approximately \$109,000, have been submitted to the said James Fowler for his determination, and considered by him, and an award has been made by

him finding that the bankrupt should pay for approximately \$34,000 of the items in dispute, and that the Australian Government should pay for approximately \$75,000 of the items in dispute, and that the services of the same James Fowler have been rendered to, and received by the trustee and the estate in bankruptcy, and that the charges made by said James Fowler for such services amount to the sum of \$1,000, and such charge being expressly agreed to and recognized by all parties present as being fair and reasonable, and that one-half thereof should be borne by the trustee. [15]

And it further appearing that certain other matters in dispute between the bankrupt and the Australian Government, represented and appearing by Mark Sheldon, its Commissioner, relating to work and materials claimed by the bankrupt to have been furnished extra to its contract with the Australian Government, and involving matters in dispute of approximately \$1,114,944.40, have heretofore, and pursuant to a provision contained in the contract between the said bankrupt and the Australian Government, been referred and submitted to a board of three arbitrators, consisting of Frank Walker, selected by the Australian Government, Frank E. Burns, selected by the trustee, and W C. Dawson, selected by said Walker and Burns, which said arbitrators have held numerous and lengthy hearings and examined a great amount of evidence, and considered the case very thoroughly, and have made an award finding that the bankrupt is entitled to an allowance from the Australian Government for

work done and materials furnished extra to its contract, in the sum of \$1,028,458.66, and that under the arrangement for the selection of said arbitrators and the holding of said arbitration, the trustee should pay the fees of Frank E. Burns, the arbitrator selected by him, and one-half of the fee of W. C. Dawson, third member of the board of arbitrators, and that the services of said arbitrators have been rendered to and accepted by the trustee and the estate of the above-named bankrupt, and it being expressly agreed and recognized by all parties present that the charges submitted by said arbitrators of \$3,000 on account of the fees of Frank E. Burns, and \$1,500 on account of the fees of W. C. Dawson, are fair and reasonable amounts for the services rendered,

And no exception or objection being taken or made to the payment of said sums, except the objection of the Australian Government, Martin General Agency and Aero Automatic Alarm that such sums are not properly chargeable to the trustee and the estate of the bankrupt,

NOW, IT IS ORDERED that the trustee be and he hereby is [16] authorized and directed to execute and deliver his trustee's check, to be duly countersigned by the referee, to the following persons for the following items and amounts, to wit:

JAMES FOWLER:

One-half of bill for services rendered... \$500

F. E. BURNS:

Services as arbitrator.....\$3,000

W. C. DAWSON:

One-half of bill for services as arbitrator \$1,500

Dated in open court at Seattle in said district this 21 day of October, 1921.

C. R. HAWKINS,
Referee.

Approved:

_____,
Judge.

Filed this 21 day of Oct., 1921, at 10 o'clock A. M.
C. R. Hawkins, Referee. [17]

In the District Court of the United States for the
Western District of Washington Northern
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD
SHIPBUILDING COMPANY, a Corporation.
Bankrupt.

Petition for Review of Mark Sheldon.

The petition of Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America respectfully represents:

First: That heretofore on July 31, 1920, this petitioner duly presented his secured claim against the said bankrupt founded upon various breaches of a contract for the building by the bankrupt of ten ships for the petitioner, and thereafter the said trustee of the said bankrupt filed certain objections to the said claim.

Second: That thereafter on the 12th day of October, 1920, an order was duly entered by a Judge of this court in this proceeding appointing C. R. Hawkins a special master to take evidence and make findings upon the questions arising out of the proof of said claim and objections thereto and to submit findings and conclusions to this Court in the same manner as if sitting as a referee in bankruptcy.

Third: That pursuant to the said order the said parties appeared before the said C. R. Hawkins, as special master, [18] upon the 20th day of October, 1920, and this petitioner proceeded to prove his claim.

Fourth: That during the progress of the said proof the said trustee objected to any further proceedings before the said special master until certain counterclaims of the trustee against this petitioner had been submitted to certain arbitrators to be appointed pursuant to certain clauses in the said contract, and thereupon the said master, over the objection of this petitioner, refused to proceed further with the said claim until the said matter had been submitted to arbitration.

Fifth: That the trustee, without obtaining any order or authority from either the Judge or the referee of this court, thereupon assumed to employ Frank E. Burns, W. C. Dawson and James Fowler as arbitrators, and the said persons so employed together with Frank Walker thereafter made certain awards and filed the same in this case, and thereafter presented to the said trustee bills for

services in the following amounts: Frank E. Burns \$3000.00; W. C. Dawson \$1500.00; James Fowler \$500.00.

Sixth: That the said trustee duly filed a report in said cause recommending the payment of the said claims, and thereafter at a creditors' meeting duly held before the Hon. C. R. Hawkins, referee in bankruptcy, this petitioner duly made objections to the said claims as hereinafter set forth, but over the objections of this petitioner the said claims were approved and thereafter upon the 21st day of October, 1921, an order was entered by the said referee authorizing the payment of said claims.
[19]

Seventh: This petitioner claims that the said ruling and order of the said referee is erroneous for the following reasons:

1. That the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

2. No order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

3. The submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the above-mentioned order appointing a special master to pass upon the said claim.

4. The awards of the said arbitrators are void upon their face.

5. The said arbitrators have rendered no beneficial service to the said trustee for the reason that the said awards have not yet been approved by this Court, but will be found by this Court upon objections which have been offered thereto by this petitioner to be void and of no force and effect.

Eighth. That this petitioner desires a review by the Judge of this court of the said order made by the said referee and files this petition therefor, and he therefore prays that the error complained of and the questions of law and fact raised before the said referee and decided by him may be certified by the said referee to the district Judge of this court that he may review the said order heretofore made and make an order setting aside the said order of payment, and that none of the said payments be made, and your petitioner ever prays.

MARK SHELDON,

As Commissioner for the Commonwealth of
Australia in the United States of America.

[20]

By SHANK, BELT & FAIRBROOK,

His Counsel.

Service of the within paper is hereby admitted
this 28th day of October, 1921.

BRONSON, ROBINSON & JONES,

Attorneys for Trustee of Pat. McDon.

Filed this 28th day of Oct. 1921, at 4 o'clock P. M.
C. R. Hawkins, Referee. [21]

In the District Court of the United States for the Western District of Washington Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

Order on Petition for Review of Mark Sheldon.

This cause came on to be heard at this term upon the petition of Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America, to review an order made and entered by the Referee herein, upon the 21st day of October, 1921, allowing and ordering payment to James Fowler of the sum of Five Hundred Dollars (\$500.00), to F. E. Burns of the sum of Three Thousand Dollars (\$3,000.00), and to F. E. Dawson, of the sum of Fifteen Hundred Dollars (\$1500.00), and was argued by counsel, and thereupon upon consideration thereof, it was,—

ORDERED, ADJUDGED and DECREED as follows: That said petition be and it hereby is denied, and the said order be and it hereby is approved, confirmed and sustained in every respect.

Done in open court this 26th day of Oct. 1922.

JEREMIAH NETERER,

Judge.

To the foregoing the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Com-

monwealth of Australia, excepts, and the exception is allowed.

Oct. 26, 1922.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [22]

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original order aptg. C. R. Hawkins, Special Master, Referee's cert. on review in matter of arbitrator's fees, Referee's order of disbursement, petition for review, and order on petition in the foregoing entitled cause, now on file and of record in my office at Seattle, Wash., and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court, this 21st day of November, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Frank L. Crosby, Jr.,

Deputy.

[Endorsed]: No. 6361. In the District Court of the United States for the Western District of Washington. In the Matter Shipbuilding Company, a

Corporation, Bankrupt (F. E. Burns, F. E. Dawson, James Fowler and John L. McLean, Appellees).
Certified Copy of Order Appointing C. R. Hawkins Special Master. Referee's Cert. in Matter of Arbitrator's Fees. Order of Referee for Payment of Arbitrator's Fees. Petition for Review. Order of Court Entered Oct. 26, 1922, Approving Referee's Order of Payment. [23]

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt.

COMMONWEALTH OF AUSTRALIA,
Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES FOW-
LER and JOHN L. McLEAN, as Trustees
in Bankruptcy of PATTERSON-Mac-
DONALD SHIPBUILDING COMPANY,
a Corporation, Bankrupt,

Respondents.

Notice of Filing Petition for Review.

To Messrs. Bronson, Robinson & Jones, Attorneys
for the Above-mentioned Respondents.

YOU ARE HEREBY NOTIFIED that on the
26th day of December, 1922, at the opening of the

office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, I will file in said office a petition for review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have the said case set down for hearing.

CORWIN S. SHANK,

Attorney for Said Petitioner Commonwealth of Australia.

We hereby accept service of the above notice this 21st day of December, 1922.

BRONSON, ROBINSON & JONES,

Attorneys for Said Respondents.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of Australia, Petitioner, vs. F. E. Burns, W. C. Dawson, James Fowler and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Respondents. Notice of Filing Petition for Review. [24]

[Endorsed]: No. 3960. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of Australia, Petitioner, vs. F. E. Burns, W. C.

Dawson, James Fowler and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division, and Transcript of Record in Support Thereof.

Filed December 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt,

Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES
FOWLER and JOHN L. McLEAN, as Trustee
in Bankruptcy of PATTERSON-MacDonald
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt,

Respondents.

BRIEF OF PETITIONER
In Petition

Under Section 24b of the Bankruptcy Act of Congress Ap-
proved July 1, 1898, to Revise, in Matter of Law, a
Certain Order of the United States District
Court for the Western District of Wash-
ington, Northern Division

CORWIN S. SHANK
Attorney for Petitioner

1002 Alaska Building

Seattle, Washington

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt,

Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES
FOWLER and JOHN L. McLEAN, as Trustee
in Bankruptcy of PATTERSON-MacDonald
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt,

Respondents.

BRIEF OF PETITIONER
In Petition

Under Section 24b of the Bankruptcy Act of Congress Ap-
proved July 1, 1898, to Revise, in Matter of Law, a
Certain Order of the United States District
Court for the Western District of Wash-
ington, Northern Division

On March 19, 1920, Patterson-MacDonald Ship-
building Company was duly adjudged a bankrupt
in the United States District Court for the Western
District of Washington, Northern Division, upon
its voluntary petition, the matter of said bank-

ruptcy was referred to the Honorable Cicero R. Hawkins as referee in bankruptcy, and the respondent John L. McLean was duly elected trustee of the said bankrupt. Thereafter Mark Sheldon, as Commissioner for the Commonwealth of Australia, for and on behalf of the petitioner filed with the said referee a claim of this petitioner in a sum in excess of \$1,000,000, founded upon alleged breaches of a contract for the construction of ten ships. This contract provided in general terms for the arbitration of all differences which might arise between the parties, and a supplemental contract provided that a certain specific question should be submitted to the arbitration of the respondent James Fowler. The trustee filed objections to the claim of this petitioner, and thereupon on October 12, 1920, an order was entered in the said District Court in the said bankruptcy proceedings as follows, to-wit:

“That C. R. Hawkins be and he hereby is appointed a special master in chancery to take evidence and make findings upon the questions arising out of the proof of secured claim filed by Mark Sheldon as Commissioner for the Commonwealth of Australia in the United States of America, and the objections thereto by the trustee in bankruptcy, and submit his findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy.” (Record pp. 9, 10).

The said matter came on regularly for hearing before the special master, and, during the hearing,

the trustee instead of presenting to the special master his claim for offsets against the claim of this petitioner asserted the right to have such claim arbitrated pursuant to the terms of the contract, and thereupon appointed the respondent F. E. Burns to act as arbitrator for him, and the said respondent Burns in conjunction with one Frank Walker, acting as an arbitrator appointed by this petitioner appointed the said respondent W. E. Dawson, and the three arbitrators subsequently filed with the said special master a paper purporting to be an award finding in favor of the trustee in the sum of \$1,028,458.66.

The most careful scrutiny of the record in this case will fail to disclose any one of the following facts: (a) either that the trustee was ever authorized by any order of the court to employ these arbitrators; or (b) that any issues either of fact or of law were ever agreed upon or made up by the parties to this so-called arbitration; or (c) that there was the slightest attempt to comply with any of the provisions of Rule 33 of the Bankruptcy Rules.

In spite of these deficiencies however the so-called awards of the arbitrators were received by the special master and their validity and effect are now questions pending on appeal in this court.

In the meantime, however, the respondents presented their bills for services to the trustee, the trustee recommended their payment at a meeting

of creditors, (Record pp. 11, 12) and over the objection of this petitioner these claims were ordered paid. (Record pp. 18-20). This petitioner thereupon filed its petition for review in the district court, (Record pp. 21-24) in which petition for review this petitioner claimed that the said ruling and order of the referee were erroneous for the following reasons:

1. That the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

2. No order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

3. The submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the above mentioned order appointing a special master to pass upon the said claim.

4. The awards of the said arbitrators are void upon their face.

5. The said arbitrators have rendered no beneficial service to the said trustee for the reason that the said awards have not yet been approved by this court, but will be found by this court upon objections which have been offered thereto by this petitioner to be void and of no force and effect.

Upon the hearing had, however, the District Court entered its order approving, confirming and sustaining the said order of the referee. (Record p. 25). To this order this petitioner took exception, and subsequently filed its petition for revision in this court.

SPECIFICATIONS OF ERROR RELIED UPON.

We respectfully submit that the order of the District Court was erroneous in the following particulars:

First: The court erred in not sustaining the objections of the petitioner to the order of the referee on the ground that the trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

Second: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that no order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

Third: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that the submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board

of arbitrators was contrary to the express directions contained in the order of this court appointing a special master to pass upon the claim.

Fourth: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that the awards of the arbitrators are void upon their face.

Fifth: The court erred in not sustaining the objection of this petitioner to the order of the referee on the ground that the arbitrators have rendered no beneficial service to the trustee.

Sixth: The court erred in approving the order of the referee ordering payment to F. E. Burns in the sum of \$3000.00, and to W. C. Dawson in the sum of \$1500.00, and to James Fowler in the sum of \$500.00.

ARGUMENT.

All of our assignments of error in this proceeding may be consolidated into one proposition: that is, that the trustee in bankruptcy did not make any attempt to comply either with Section 26 of the Bankruptcy Act or Rule 33 of the Bankruptcy Rules, but, entirely of his own motion, attempted to appoint these arbitrators and thereby render the estate liable to compensate them for their services; and a trustee in bankruptcy is not empowered to do this.

We assume for the purpose of this proceeding that it is immaterial whether or not the award of the arbitrators was correct upon the merits, as it appears to be clearly the law, that the fact that the judgment of an arbitrator upon the merits is erroneous does not deprive him of his right to fees. We have therefore expressly omitted from this record all facts relative to the correctness or validity of this award as between the trustee and the claimant which is now on appeal in another proceeding and will be argued at the May term. We confine ourselves explicitly to the question: Is a trustee in bankruptcy authorized to employ arbitrators without a compliance with the Bankruptcy Act and rules relative thereto? We submit, however, that upon determining whether an arbitrator is entitled to his fees, the same rules of law apply as to any other contract of employment: that is to say, that where a public official or quasi-public official attempts to employ an individual to perform any services, an authority to effect such employment must exist as a necessary condition to the employee's right to recover compensation.

A trustee in bankruptcy receives his power from the Bankruptcy Act and from that act alone, so that before it can be determined that a trustee has power or authority to do any specific act, a provision of the Bankruptcy Act must be found conferring such power. The Bankruptcy Act establishes a court for the adjudication of claims against

the bankrupt and that court is the Federal District Court. Section 1 (7) of the Bankruptcy Act provides that “‘the court’ shall mean the court of bankruptcy in which the proceedings are pending and may include the referee.”

It will thus be seen that the trustee has none of the power given to the court as a court, also that the bankruptcy act does not give any administrative powers to a special master as such. The entire administrative power vested in the court of bankruptcy as a court are to be exercised only by the judge or the referee acting as such, after the matter has been referred to him by the judge.

Section 2 (2) provides that courts of bankruptcy shall have jurisdiction to “allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.”

Section 2 (7) provides that these courts shall have jurisdiction to “determine controversies in relation thereto, except as herein otherwise provided,” and Section 2 (19), “to transfer cases to other courts of bankruptcy.”

Section 55 (b) provides that “at the first meeting of creditors the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of the creditors there presented.”

Section 57 (d) provides that "claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57 (f) provides that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit."

Section 57 (k) provides that "claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case before but not after the estate has been closed."

Section 58 (7) provides that creditors shall have statutory notice of "the proposed compromise of any controversy."

Section 63 (b) provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 25 provides for an appeal to the Circuit Court of Appeals "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

While to make sure that there can be no question as to the intent of the act, section 65 (c)

provides that "a claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act."

It will thus be seen that the Bankruptcy Act gives exclusive jurisdiction to the District Court to adjudicate claims against the bankrupt and the jurisdiction of the District Court so to do is necessarily exclusive except as modified by any other provisions of the act.

Section 26 provides for arbitration under certain conditions. This section reads as follows:

"(a) The trustee may, pursuant to the directions of the court, submit to arbitration any controversy arising in the settlement of the estate.

(b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

(c) The written finding of the arbitrators or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."

The method of obtaining the "direction of the court" in order to authorize a submission to arbitration is contained in Rule 33 of the Bankruptcy Rules which provides as follows:

“Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt’s estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration, or otherwise.”

These provisions clearly require that definite issues shall be made up between the trustee and his opponent, that these issues be presented to the court together with the reasons why it is for the interest of the estate that the controversy should be settled by arbitration, that a specific order of the court should be obtained settling the issues to be determined and authorizing the employment of arbitrators and that the proceedings had before the arbitrators and the award of the arbitrators should be in such form that the award should have the effect of a verdict of a jury: that is to say, it should be conclusive only as to questions of fact properly submitted to them under the contract of submission. It is not claimed by the respondent that this procedure was followed in any particular. The claim of the respondents is that the contract which formed the basis of the petitioner’s claim provided for arbitration of all differences between

the parties and that the trustee in succeeding to the rights of the bankrupt under the contract also succeeded to the right and power of employing a court of his own choosing to adjudicate the differences arising between the parties to such contract.

The only provision of §26 of the Bankruptcy Act and Rule 33 of the Bankruptcy Rules which was complied with in connection with this so-called arbitration was the appointment of the magical number of three arbitrators and the manner of their appointment; but this fact happened, not because it was required by the Bankruptcy Act, but because it was required by the provisions of the contract in question. In other words, the trustee does not claim that his authority to employ arbitrators came from the Bankruptcy Act and a compliance therewith, but from a succession to the right of the bankrupt to set up a court of his own, and this was also the theory adopted by the referee.

There seems to be a general superstition that a trustee in bankruptcy "stands in the shoes of the bankrupt" in all particulars. This is true in many particulars but it is true only in cases where specific authority therefor is found in the Bankruptcy Act. For instance, the trustee takes the title of the bankrupt to all of the bankrupt's property but that is because §70 (a) so provides. The trustee may, *if authorized by the court*, take over pending executory contracts of the bankrupt and carry them out, but that is because §2 (5) authorizes

him so to do. The trustee may, *if so ordered by the court* be substituted for the bankrupt either as a party plaintiff or defendant in any litigation pending at the time of the bankruptcy, but that is because it is so provided by §11. The trustee can, with certain specified exceptions, bring or prosecute an action only in the same court where the bankrupt might have brought or prosecuted the same action, but this is so because §23 so provides. We thus see that the trustee "stands in the shoes of the bankrupt" in many respects, but this is true only because the Bankruptcy Act so provides for that state of affairs. When it comes, however, to a claimant prosecuting a claim against the bankrupt, the Bankruptcy Act specifically provides courts (i. e. the courts of bankruptcy) for such a proceeding, specifically provides that the trustee shall, against any such claim, assert in the court of bankruptcy any set-off that the bankrupt might have had against the claimant and then provides that arbitration may be had *but only under conditions specifically set forth in the act*.

That the jurisdiction of the Bankruptcy Court to adjudicate upon a claim asserted against a bankrupt is exclusive has been held in no uncertain terms by the Supreme Court of the United States. In *U. S. F. & G. Co. v. Bray*, 225 U. S. 205; 56 L. Ed. 1055, it appears that the court of bankruptcy had given *express leave* that the adjudication upon a claim should be had in a suit to be instituted in

a United States Circuit Court, but the Supreme Court said:

“An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of a fund belonging to the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, *supra*. The real controversy is over the merits of some of those claims, the right of the present holders to assert them for their full amount, and the priority to be accorded them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by the present plenary bill in equity it is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what

priority shall be accorded them. The circuit court of appeals holds that this cannot be done consistently with the bankruptcy act, and the correctness of its holding is the principal question presented by this appeal. * * *

“A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

“Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender the exclusive control over matters of administration or to confide them to another tribunal.”

We thus see that the jurisdiction of the bankruptcy court to adjudicate upon claims against the bankrupt is exclusive. If, as was determined in the case last above cited, the bankruptcy court could not remit the adjudication of a claim to another federal court to be there adjudicated sub-

ject to the appellate jurisdiction of the same court as it would have been subject to if it had remained in the bankruptcy court, how much clearer must it be that a trustee in bankruptcy, without any authority whatsoever from the court, has no power to submit a matter involving a question of law to the arbitration of three individuals who are not lawyers, their decision to be absolutely binding both as to law and fact, without any power in either the bankruptcy court or any appellate court to correct whatever error of fact or law they might commit.

There are absolutely no authorities arising directly out of arbitration cases either for or against the power of a trustee in bankruptcy to submit a question to arbitration without first complying with §26 of the Bankruptcy Act or Rule 33 of the Bankruptcy Rules, but undoubtedly this is so for the simple reason that such a case has never arisen. Ordinarily, a trustee looks upon the Bankruptcy Act and the Bankruptcy Rules as his code of procedure and attempts to comply therewith, and this appears to be the first attempt of this nature made by a trustee in bankruptcy.

Various other cases, however, may be found where other public or quasi-public officials have attempted to submit questions to arbitration without first determining whether they were authorized so to do and the universal decision is that, in the ab-

sence of specific authority, an official has no power to submit a question to arbitrators or to arbitration.

In *District of Columbia v. Bailey*, 171 U. S. 161; 43 L. Ed. 118, the commissioners of the District of Columbia submitted a claim in issue with a contractor to the award of an arbitrator, and on the question of whether the award was valid, the Supreme Court said:

“The general rule is, ‘that everyone who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting.’ *Kyd*, p. 35; *Russel, Arbitrators*, p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: ‘A submission is a contract.’ And again, at p. 50: ‘The submission is the agreement of the parties to refer. It is therefore a contract, and will in general be governed by the law concerning contracts.’ In *Witcher v. Witcher*, 49 N. H. 176, the Supreme Court of New Hampshire said (p. 180): ‘A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed.’ It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be the act of the corporate body (*Russell, Arbitrators*, 5th ed. p.

20): which act was of necessity required to be evidenced in a particular manner.”

After reviewing the various provisions of the statute relating to the powers of the commissioners, the court said:

“There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common law submission.”

In *Van Slooten v. Dodge*, 39 N. E. 950, (N. Y.) it appeared that the respondent, Van Slooten, had presented a claim against the executor of an estate for the value of a diamond ring which she alleged the executor was wrongfully detaining from her on the ground that it was an asset of the estate. The executor had disputed the validity of the claim and thereupon a reference had been consented to and ordered pursuant to a statute of the state of New York which provides for such a reference to determine validity of claims against the deceased. The referee had reported in favor of the claimant, but the court of appeals, however, held that inasmuch as this was not a claim that existed at the time of the death of the deceased it did not come within the statute and therefore the reference was a nullity, saying:

“The executor could not, by offering to refer the claim, waive the essential prerequisite

of the statute that the claim must have been one against the deceased, which had accrued in his life, or which would have accrued against him, had he lived."

The same sort of a question came up again in *Shorter v. Mackey*, 43 N. Y. Suppl. 112, and the court there held that the parties were not estopped by having submitted to reference from claiming that the reference was void.

The same question again came up in *In re Mudge*, 118 N. Y. Supp. 568, and the court then said:

"Even if both parties consent, jurisdiction would not be conferred to refer, if later either party objected."

In *Plum Bayou Levee Dist. v. Harper*, 116 S. W. 196 (Ark.), the president of a levee district had agreed to arbitrate a question of damages with a property owner. The arbitration was duly had and the property owner brought suit upon the award but the court said:

"This appeal raises the question as to whether the president, in the absence of authority given him by the board of directors of the levee district, can make an agreement with a landowner for the amount of damages suffered by him for lands appropriated by the levee district for use in building its levee; for, if the power did not exist in the president to make such a contract, it follows that he had no authority to enter into an arbitration. The act

itself prescribes the duties of the president, and no such authority is given him by the terms of the act. That power is placed in the board of directors. The facts in this case are undisputed, and the record does not disclose that the board of directors delegated to the president the authority to act in respect to the matter in question."

We thus see that, in the absence of statutory authority, a statutory official has no power to submit a question regarding his trust to arbitration.

Some claim is made by the respondents that this arbitration was a "substantial" compliance with §26 of the Bankruptcy Act and Rule 33, but a comparison with what was done in this matter with the provisions of these sections but leads one to the conviction that such is not the case. Section 26 (a) provides that the submission shall be "pursuant to the direction of the court." It is not claimed that there ever was any formal order entered by any court or any judicial officer whatsoever authorizing this arbitration. The most that can be claimed was that Cicero R. Hawkins, who was the referee to whom this bankruptcy had been referred generally, was the same individual as the Cicero R. Hawkins who, as special master, refused to proceed with the hearings upon the claim of the Commonwealth of Australia until something purporting to be an award by arbitrators was filed with him. Cicero R. Hawkins as special master had no jurisdiction to authorize an arbitration, for his

sole power as set forth in the order appointing him was to "take evidence and make findings * * * and to submit his findings and conclusions" to the court. Cicero R. Hawkins as referee had no jurisdiction to authorize an arbitration for the reason that Judge Neterer, when he made the order of October 12, 1920, setting up a special tribunal to adjudicate upon this claim, took away from the referee all power over the adjudication upon this claim, as he was duly authorized to do under §22 (a) of the Bankruptcy Act, under which a judge may directly cause the trustee to proceed with the administration of the estate or refer it generally to the referee "or specially with only limited authority to act in the premises or to consider and report upon specified issues." The order of Judge Neterer, entered upon October 12th, 1920, took from Cicero R. Hawkins, sitting as referee, all power over the adjudication upon this claim and necessarily all matters connected therewith, and did not vest in Cicero R. Hawkins, sitting as special master, any power to authorize the submission of any question connected therewith to arbitration. By this order, Judge Neterer assumed control over the adjudication of this claim and set up a special tribunal to hear it, and the referee, special master and the parties all combined had absolutely no power to erect any special court to try any issues connected with the matter except by the consent of the judge, evidenced by a formal modification of

his order. Furthermore, §26 clearly contemplated the framing of distinct issues of *fact* upon which arbitrators can make findings of fact which "shall have like force and effect as a verdict of a jury." There is no claim that any definite issues of fact were ever presented to these arbitrators. The utmost that is claimed is that these three arbitrators were appointed, there was much wrangling before them and they finally filed what purported to be an award.

Furthermore, there is not the slightest pretense of any compliance with Rule 33 of the Bankruptcy Rules. If this arbitration is to be upheld it can only be upheld upon the theory that the Bankruptcy Rules are only scraps of paper. This however is not the law as laid down by this court. In the case of *In re Gerber*, 186 Fed. 693, a referee in his desire to work out what he considered substantial justice, proceeded to disregard certain of the bankruptcy rules, but upon petition to this court for revision, this court said: "The rules and forms so prescribed by the Supreme Court under and by virtue of the Bankruptcy Act have the force and effect of law." Again, in *Sabin v. Blake-McFall Co.*, 223 Fed. 501, petitioning creditors failed to verify their petition in the form set forth in the general orders in bankruptcy. The District Court denied a motion to dismiss on this account, but this court said:

“We take advantage of this petition to revise, to impress upon counsel in bankruptcy proceedings the necessity and importance of closely scrutinizing and following the provisions of the bankruptcy act in the preparation of petitions, and, indeed, in the preparation of all papers connected with such proceedings. Definite, prescribed forms and methods of procedure in bankruptcy have been promulgated by the act, and also by the Supreme Court pursuant thereto. These forms and methods of procedure are especially adapted to the purposes sought to be accomplished by the act and they are in the main free from ambiguity and easily comprehended. To ignore them and trust to whatever form of statement may occur to the pleader is to invite criticism and objection from opposing counsel and to materially add to the expense of the proceeding and to the labors of the lower and appellate courts. If the provisions of the bankruptcy act are followed and the forms adhered to, proceedings in bankruptcy may be made inexpensive, and the questions involved may receive, at the hands of the courts, the immediate attention and the prompt disposition and determination which the framers of the act sought to accomplish.”

This court thereupon stated that the petitioning creditors had 10 days to comply with the Bankruptcy Rules which they had disregarded under the penalty of having their petition dismissed.

It doubtless is the fact in this particular instance that all other creditors are very well satis-

fied with this arbitration, and, by reason of a very friendly feeling towards the arbitrators on account of their favorable decision, have not the slightest desire to contest the validity of this arbitration, but a rule of law is to be established in this case. If a trustee, who in this particular case was definitely opposed to the approval of the claim of the Australian Government, may without the knowledge or consent of the other creditors, indulge in arbitration, another trustee in another case who is favorable towards the approval of a doubtful claim can also indulge in arbitration without the knowledge or consent of the other creditors. He may proceed to appoint an arbitrator who is supposed to represent the opposition to the claim, but is really honestly favorable to it. It is possible that an arbitration agreement may be made under which the arbitration may be had behind closed doors without any definite issues to be determined and without the making of any record of the proceedings and the award so entered shall be final and unappealable. If this is in accordance with the bankruptcy law, the holder of a doubtful claim who has succeeded in obtaining the election of a trustee favorable (or at least not definitely unfavorable) to himself, has a very ready and efficient method of procedure to obtain a favorable action upon his claim which no other creditor can overturn. But the Bankruptcy Act does not intrust any such power to the trustee. Even the referee or the judge of the district court

has no power to approve a claim so finally that the matter can not be reopened and the claim re-examined, if a creditor can show good cause. A creditor may even appeal from an order approving a claim if the trustee refuses so to do and good cause is shown, but if the trustee may without any order of the court submit a controversy to a general arbitration, it is within the power of a creditor holding a doubtful claim, to obtain an approval of such doubtful claim without the slightest chance of any other creditor being able to obtain the re-examination of such claim.

We respectfully submit that the action of the trustee in employing these arbitrators without making any attempt to comply with Section 26 of the Bankruptcy Act or with Rule 33 of the Bankruptcy Rules was in direct defiance of the letter and spirit of this act and these rules, and that upholding him in such procedure must necessarily lay down a rule of law which would form an available basis for collusion between a creditor and trustee for the purpose of obtaining an absolutely unappealable approval of a doubtful claim and therefore should not be allowed to stand.

We would respectfully submit that the order of the District Court should be reversed with instructions to deny the claim of these arbitrators for their fees.

Respectfully submitted,

CORWIN S. SHANK,
Attorney for Petitioner.

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,
Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES FOW-
LER and JOHN L. McLEAN, as Trustee in
Bankruptcy of PATTERSON-MacDON-
ALD SHIPBUILDING COMPANY, a Cor-
poration, Bankrupt,
Respondents.

ANSWER TO
Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Western District
of Washington, Northern Division.

FILED

FEB 7 - 1923

F. D. MONGKTON,
CLERK,

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Attorneys for Respondents.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3960.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,
Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES
FOWLER and JOHN L. McLEAN, as
Trustee in Bankruptcy of PATTERSON-
MacDONALD SHIPBUILDING COM-
PANY, a Corporation, Bankrupt,
Respondents.

Answer to Petition for Review.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit.

Come now the respondents above named, and
without waiving, but specifically reserving to them-
selves any and all rights to move against the pro-
ceedings or demur to the petition herein for de-
fects or insufficiencies appearing upon the face
thereof, for their answer to the petition for review
respectfully show as follows:

I.

Referring to paragraph II of the petition, re-
spondents admit the presentation of a claim by the

petitioner against the bankrupt, and the disallowance thereof and the appeal for the order disallowing the same, as therein alleged, and deny each and every other allegation contained in said paragraph, and state that the entire facts relative thereto are as follows:

That upon the filing of said claim, the trustee filed written objections thereto upon several grounds, one ground of objection being that the said claim was unliquidated, and thereupon the petitioner applied to Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, for an order directing the manner of liquidating said claim; that thereupon, the District Judge, with the consent of the parties, entered an order designating and appointing Hon. C. R. Hawkins, Referee in Bankruptcy before whom the bankruptcy proceedings were and are pending, a Special Master to take evidence and make findings upon the questions arising out of petitioner's claim and the trustee's objections thereto, and submit his findings and conclusions to the District Court; that the Special Master proceeded in accordance with said order, and thereafter filed with the District Court his report finding that the bankrupt was not indebted to the petitioner, in any sum whatsoever, but that, on the contrary, it had overpaid the petitioner over and above all just charges due and owing at the time of bankruptcy by the sum of \$312,602.48; that said report of the Special Master was, after hearing and argument, duly approved and confirmed by the

District Judge upon which decision an appeal has been taken and is now pending; and respondents deny that petitioner has any valid claim whatsoever against the bankrupt.

II.

Referring to paragraph IV of said answer, respondents state that the said contract therein referred to, in addition to the general provision for arbitration, being paragraph eighteen thereof, also provided by paragraph seven that the owner should have the right to order extras, and that in case the parties should be unable to agree as to the effect of such alterations, omissions, additions and substitutions or the price thereof, the dispute should be determined as provided by paragraph eighteen thereof; that the Special Master ruled that certain questions of extras should be submitted to arbitration in accordance with the provisions of said paragraph eighteen, and thereupon respondents selected as their arbitrator, Frank E. Burns, and petitioner selected as its arbitrator, Frank Walker, and the two arbitrators so chosen selected as the third arbitrator, W. C. Dawson; that such selection and the arbitration held before said arbitrators was, in fact and in substance, a compliance with section twenty-six of the Bankruptcy Act; that the said C. R. Hawkins, who acted as Special Master, was and is also the Referee in Bankruptcy before whom the matter of the bankruptcy herein was and is pending.

III.

Referring to paragraph VII, respondents state

that by an agreement between the petitioner and the bankrupt dated March 31st, 1919, it was provided, section five:

“As regards certain questions of stores and equipment hitherto in dispute (such as awnings, canvas covers, certain deck equipment, engine-room tools, compasses, binnacles, sidelights, etc.), it is now agreed that the question whether the cost of these items, or any of them, is to be paid by the owners or contractors, shall be decided by reference to Mr. Fowler, Lloyd’s Surveyor at Seattle, whose decision shall be binding upon both parties.”

That the said Mr. Fowler, referred to in said agreement, is the same person as James Fowler, respondent, herein, and that the arbitration proceedings before him were had and the award rendered by him was made under and pursuant to such contract; that said matters had been submitted to James Fowler pursuant to said contract, and the said arbitration proceedings were pending before him, at the time of the adjudication of bankruptcy herein.

IV.

Referring to paragraph IX of said petition, respondents state that the petitioner expressly consented and agreed that the amounts asked and allowed to the arbitrators as compensation were just and reasonable for the services rendered by them.

WHEREFORE, respondents pray that the petition for review herein be denied.

F. E. BURNS,
W. C. DAWSON,
JAMES FOWLER,
JOHN L. McLEAN, As Trustee in Bankruptcy of Patterson-Macdonald Shipbuilding Company, a Corporation,
Respondents.

By IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Attorneys for Respondents.

United States of America,
State of Washington,
County of King,—ss.

H. B. Jones, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the respondents above named, and has signed the foregoing answer on their behalf, being duly authorized thereto; and that he has read said answer and makes oath that the statements therein contained are true as he verily believes.

H. B. JONES.

Subscribed and sworn to before me this 23 day of January, 1923.

[Seal]

W. L. GRILL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within answer admitted this 22d day of Jan., 1923.

CORWIN S. SHANK,
Atty. for Petitioner.

[Endorsed]: Answer to Petition for Revision,
etc. Filed Jan. 26, 1923. F. D. Monckton, Clerk.
By Paul P. O'Brien, Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in
Bankruptcy of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt,
Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Western District
of Washington, Northern Division,
and Transcript of Record in
Support Thereof.

FILED

JAN 10 1923

F. D. MONROTON,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

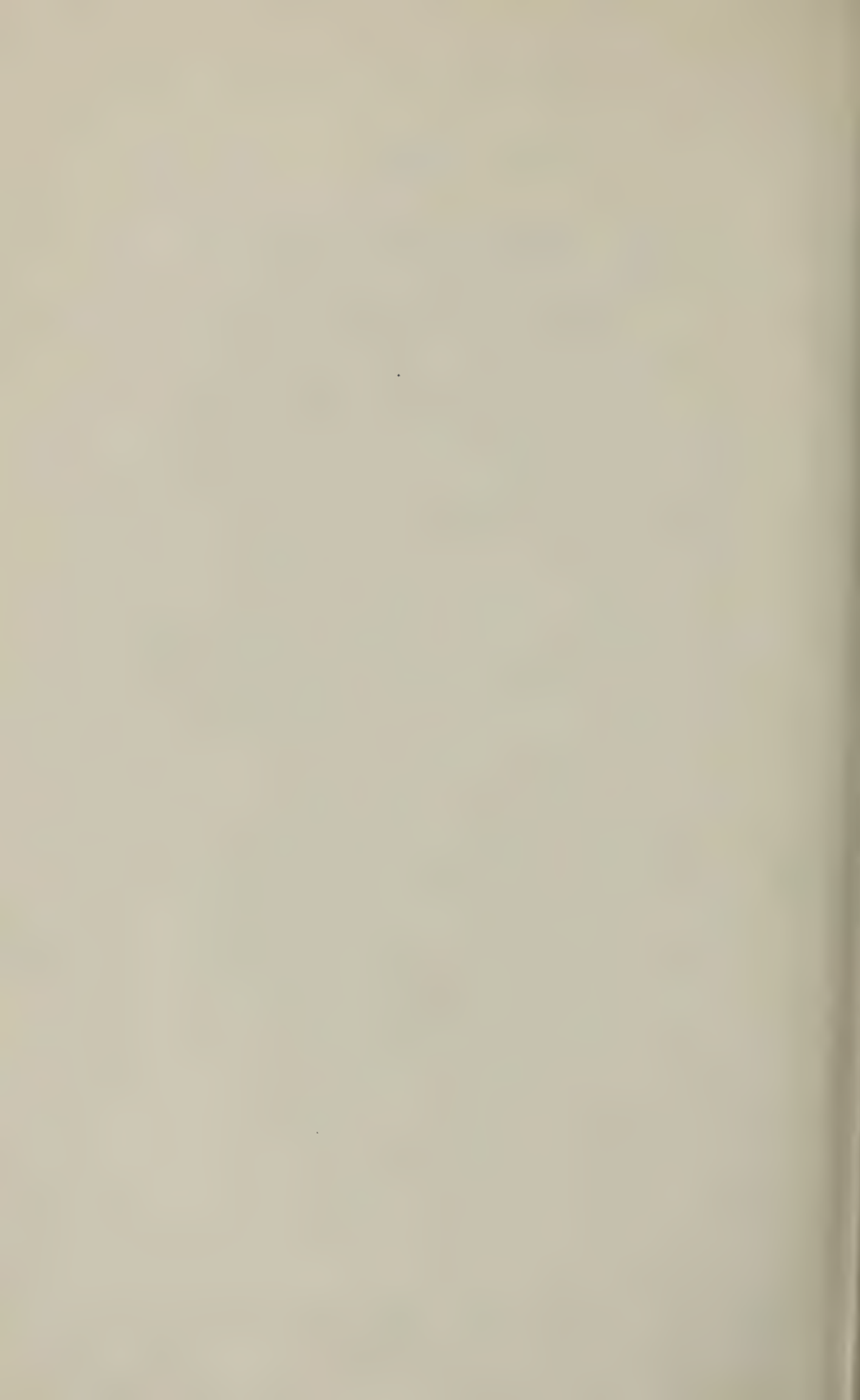
vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in
Bankruptcy of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation, Bankrupt,

Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
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and Transcript of Record in
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals for the
Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of PATTERSON-
MacDONALD SHIPBUILDING COM-
PANY, a Corporation, Bankrupt,

Respondents.

Petition for Review of Commonwealth of Australia.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of the Commonwealth of Australia
respectfully shows unto the Court:

I.

That upon March 19, 1920, an order was duly
entered in the United States District Court for the
Western District of Washington, Northern Divi-
sion, adjudging Patterson-MacDonald Shipbuilding
Company, a corporation, bankrupt, upon its volun-
tary petition for such an order and upon the said
day the matter of the said bankruptcy was referred
to the Honorable Cicero R. Hawkins, Referee in
Bankruptcy, and thereafter on April 2, 1920, at the
first meeting of creditors of the said bankrupt duly

called and held before the said referee, [1*] John L. McLean was duly elected trustee of the said bankrupt, and thereafter duly qualified as such and ever since has been and is now the duly authorized and acting trustee for said bankrupt.

II.

That thereafter, on the 31st day of July, 1920, Mark Sheldon, as Commissioner for the Commonwealth of Australia, for and on behalf of this petitioner, presented and filed with the said referee a claim of this petitioner against the said bankrupt, in a sum in excess of \$1,000,000. That upon objections made to the said claim by the trustee, the said claim has been by the District Court disallowed, but an appeal from the said order of disallowance is now pending in this court, and according to the present knowledge and advice of this petitioner, this petitioner has a valid claim against the said bankrupt for a sum in excess of \$1,000,000, and the total of all other approved and unpaid claims against the said bankrupt is less than \$70,000.

III.

That at a meeting of the creditors of the said Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, held on August 18, 1922, before the Honorable Cicero R. Hawkins, Referee in Bankruptcy, there was presented to the creditors a letter from the said A. M. MacDonald to the

*Page-number appearing at foot of page of original certified Transcript of Record.

said John L. McLean, Trustee in Bankruptcy, of which the following is a copy, to wit:

“Seattle, Washington, July 20, 1922.

Mr. J. L. McLean, Trustee in Bankruptcy,

Patterson-MacDonald Shipbuilding Company,
Seattle, Washington.

Dear Sir:

Having been engaged by you and your attorneys, at the time of [2] your appointment as Trustee in Bankruptcy, to prosecute all claims for and against the Patterson-MacDonald Shipbuilding Company, I proceeded forthwith to assemble, first, documents, data and so forth necessary to enable me to intelligently carry on the large undertaking of properly establishing the claims of the Shipbuilding Company against the Australian Government and the United States Shipping Board, Emergency Fleet Corporation.

In the fall of 1920 arbitration proceedings were started with a view to adjusting the Company's claims against the Australian Government, which proceedings lasted until February, 1921. I then left for Washington, D. C., in company with Mr. H. B. Jones (of the firm of Bronson, Robinson and Jones, your attorneys) for the purpose of presenting the Company's claims against the Emergency Fleet Corporation. A great deal of detail work was necessary, as you can readily appreciate, before the matter was gotten into presentable form, but the work was more than justified in results obtained since the claims were allowed: the decision of the 'Claims Commission' was for a cash

payment in favor of the Company of three hundred fifty-three thousand (\$353,000.00) dollars, salvage materials valued at seventy thousand (\$70,000.00) dollars, and commitments to be assumed by the Emergency Fleet Corporation aggregating forty thousand (\$40,000.00) dollars. Total four hundred sixty-three thousand (\$463,000.00) dollars.

On my return from Washington, arbitration proceedings with the Australian Government were continued and in July, 1921, the Board of Arbitrators rendered their unanimous decision in favor of the Shipbuilding Company. Notice was then received from the United States Shipping Board that a new 'Claims Commission' had been appointed by the New Administration, which new Commission would reconsider all claims against the Emergency Fleet Corporation that [3] had already been adjudicated; this necessitated, of course, the reopening of the Patterson-MacDonald case, a practical duplication of the work previously done and in addition the preparation and presentation of additional supporting evidence as called for by the New Commission; this together with matters pertaining to the Company's claims against the Australian Government, consumed the time to October, 1921; I again journeyed to Washington in the interest of the Company's case against the Emergency Fleet Corporation; this time, after many strenuous and anxious sessions with the 'Claims Commission' a settlement was entered, which I consider a most satisfactory one for the

Shipbuilding Company, whereby the claimant received a cash payment of two hundred seventy-seven thousand two hundred fifty-three and $74/100$ dollars (\$277,253.74) and in addition to such cash payment the claimant to retain for its own use and benefit all moneys received for salvaged materials the estimated value of which is seventy thousand (\$70,000.00) dollars; and further, the Emergency Fleet Corporation to assume all commitments, outstanding against the cancelled contract of the United States Shipping Board, amount approximating forty thousand (\$40,000.00) dollars, making a total settlement of three hundred eighty-seven thousand two hundred fifty-three & $74/100$ dollars. The securing of the adjustment hereinabove recited and attending to all matters that came up in connection with our case until payment was finally made took the writer up until June of this year.

Up to date, my expenses on two trips to Washington, the one taking three and one-half months and the other a little over eight months, together with four trips from Washington to New York, totals seventy-four hundred and six (\$7,406.00) dollars in detail as follows: [4]

Railroad fares:

Two trips Seattle to Washington, D. C..	\$700.00
Four round trips Washington, D. C. to New York.....	116.00

Hotel expenses:

Including meals, miscellaneous and in- cidental items, 345 days at \$19.00..	6,555.00
Stenographic services	35.00

Total.....\$7,406.00

I have received from you through the court on my expense account payments as follows:

February 15, 1921.....	\$1,000.00
April 25, 1921.....	1,000.00
June 1st, 1921.....	1,500.00
October 5th, 1921.....	3,000.00
	<hr/>
	\$6,500.00

This leaves a balance unpaid, due me on expense account of nine hundred and six (\$906.00) dollars.

The work that you engaged me to perform is practically finished and I hereby make formal request of you at this time for a payment of twenty thousand (\$20,000.00) dollars, on account, for services rendered during the two years and four months last past.

Should you at any time find that you again need my services, I shall be only too pleased to render all assistance possible.

Yours truly,

A. M. McDONALD."

IV.

That thereupon this petitioner objected to the making of any allowance to the said A. M. MacDonald upon the grounds

First. That the said A. M. MacDonald was never employed to [5] render any services.

Second. That such services as he rendered were required of him under the Bankruptcy Act as an officer of the bankrupt.

Third. That the amount of the said claim was excessive.

V.

That at said meeting, the trustee and his attorneys advocated the payment of the said claim.

VI.

That at said meeting no witnesses were sworn or examined but the entire proceedings were taken and had upon the unsworn statement of the said A. M. MacDonald as set forth in said letter and the recommendation of the trustee's attorneys; that at said meeting said referee thereupon made an order allowing to the said A. M. MacDonald the sum of \$20,000.00 in full payment of his services and all of his expenses, and for the reason that the said A. M. MacDonald had already been paid the sum of \$6,500.00 entered an order that the said A. M. MacDonald be paid an additional sum of \$13,500.00.

VII.

That this petitioner thereupon filed with the said referee its petition for review of the said order of the said referee ordering the payment of \$13,500

to the said A. M. MacDonald, in which petition for review this petitioner claimed that the said ruling and order of the said referee were erroneous for the following reasons:

1. There was no sworn statement, either oral or written, and no itemized statement of any kind made to form the basis of any claim herein as required by the bankruptcy act and the rules and the practice of this Court.

2. That there is no segregation in the order of the items, so it is [6] impossible to determine how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.

3. That the said trustee nor his attorneys were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatsoever for services to be rendered by the said A. M. MacDonald.

4. That the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

5. That it is contrary to the letter and spirit of the bankruptcy act and rules and the practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

6. That the said allowance is excessive.

VIII.

That thereafter the said referee duly filed his certificate on review in the office of the clerk of the said District Court and thereafter upon the said matter coming up before the Court answers to certain questions propounded were stipulated in open court as true, to wit:

1. Was the said A. M. MacDonald a stockholder, officer or chief managing agent of the bankrupt at or prior to the adjudication of bankruptcy of the said bankrupt?

Answer: Yes.

2. Was there any sworn statement, either oral or written, made regarding the nature of the services rendered by the said A. M. MacDonald to the said bankrupt's estate?

Answer: No. [7]

3. Was there any segregation in the allowance for payment of expenses necessarily incurred and for services, and if so give such segregation.

Answer: None but letter.

4. Was there any segregation of allowances for services rendered in the matter of presenting the claim of the bankrupt's estate against the United States Emergency Fleet Corporation, and in the matter of contesting the claim of the Commonwealth of Australia, and if there was any such segregation what was the allowance for each item?

Answer: No segregation.

5. Is it a fact that in the event of the claim of the Commonwealth of Australia being rejected there will be a substantial sum of money left, after pay-

ing all claims of creditors, to be returned to the bankrupt corporation?

Answer: Yes.

IX.

That at the hearing before the Judge, it was stipulated that the said A. M. MacDonald might file an affidavit to be considered a part of the record, which affidavit as filed by the said A. M. MacDonald in accordance with said stipulation, omitting the formal parts, is as follows:

“A. M. MacDonald, being first duly sworn, on oath, deposes and says: That in response to the demand of Mr. Corwin S. Shank, attorney for the Commonwealth of Australia, and the instructions of the Court for submission of a sworn statement in support of his claim for compensation for services and expenses in the above matter, he does hereby refer to and adopt, and by this reference make a part of this affidavit as fully as if set forth at length herein, his letter of July 20, 1922, addressed to Mr. J. L. McLean, trustee in bankruptcy of the above estate, and does hereby under oath state that the facts set forth in said letter are true and correct, except as hereinafter modified; and affiant does further state in reference to this matter as follows: [8]

I left Seattle for Washington, D. C., February 18th, 1921, getting back to Seattle, May 28th, 1921.

I again left for Washington, D. C., October 25th, 1921, getting back to Seattle, July 4th, 1922, making a total of 351 days, 16 of these days being consumed on train.

These trips each way cost \$214.50 per trip, which included railroad fare, Pullman, meals and tips. The four trips totaled:\$ 858.00

Hotel and other expenses incurred on trip as follows:

Hotel, 335 days at \$7.00 per day.....	2,345.00
Meals at \$5.50 per day	1,842.50
Tips \$2 per day	670.00
Other miscellaneous expenses including luncheons, dinners, laundry, automobiles, etc., at \$4.50 per day.	

This makes a total of \$19 per day.. 1,507.50

Four trips from Washington to New York	116.00
Stenographic services	35.00

\$7,374.00

A. M. MacDONALD."

X.

That thereafter on the 26th day of October, 1922, the said Court entered its order on the said petition and review denying the said petition and approving, confirming and sustaining the said order of the referee in every respect, to which order this petitioner took due and proper exception.

XI.

Your petitioner further shows that it is aggrieved by the said orders of the said District Court and injured thereby, and that the errors complained of consist: [9]

First: The Court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that there was no segregation in the order of the items so that it was impossible to determine from the said order how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.

Second: The Court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that the said John L. McLean, trustee, in bankruptcy, nor his attorneys, were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatever for services to be rendered by the said A. M. MacDonald.

Third: The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

Fourth: The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that it is contrary to the letter and spirit of the bankruptcy act and the rules and practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

Fifth: The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said allowance is excessive.

Sixth: The Court erred in approving the order of the [10] referee ordering payment to the said A. M. MacDonald in the sum of \$13,500.00.

XII.

Your petitioner further shows that the said trustee and his attorneys have throughout the said proceedings favored and advocated the payment of the said A. M. MacDonald's claim and the attorneys for the said trustees appeared upon the hearing in the said District Court in support of the said order of the said referee and in opposition to this petitioner's petition for review so that it would be a useless formality to ask that the said trustee petition this Court to revise the said order entered in the said District Court.

WHEREFORE, your petitioner prays that the said order, judgment and decree of the said District Court be reviewed and revised in the matters of law and that it be adjudged by this Court that the said orders of the District Court and of the referee be reversed and that the said A. M. MacDonald take nothing by his claim.

COMMONWEALTH OF AUSTRALIA.

By CORWIN S. SHANK,
Attorney for Petitioner.

United States of America,
State of Washington,
County of King.—ss.

Corwin S. Shank, being first duly sworn, on oath, deposes and says: That he is the attorney of the Commonwealth of Australia in the foregoing action and signed the foregoing petition on behalf of the said petitioner, being duly authorized thereto and that he has read the foregoing petition, and makes oath that the statements contained therein are true as he verily believes.

[Seal]

CORWIN S. SHANK.

Subscribed and sworn to before me this 21st day of December, 1922.

H. C. BELT,
Notary Public in and for the State of Washington,
Residing in Seattle. [11]

In the District Court of the United States for the
Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt.

Referee's Certificate on Review.

I, C. R. Hawkins, one of the referees of this court in bankruptcy, do hereby certify that during the

course of the administration of said matter before me an order was made allowing A. M. MacDonald the sum of \$20,000.00 in full for his services rendered and expenses incurred in behalf of the trustee in the liquidation of the claim of the bankrupt against the United States Shipping Board Emergency Fleet Corporation, and for his services rendered the trustees in connection with the liquidation of the unliquidated claim asserted against said estate by the Australian Government in the sum of \$1,100,000.00, and for other services rendered the trustee in connection with the administration of said estate.

The said MacDonald having previously been paid the sum of \$6,500.00 on account of said services and expenses, the trustee was by said order directed to pay said MacDonald the sum of \$13,500.00 being the balance of said allowance.

The Australian Government, represented by its attorneys Messrs. Shank, Belt & Fairbrook, feeling aggrieved at said order filed its petition for review thereof, which was granted.

The six alleged errors of the referee in making the ruling and order complained of, which are set out in paragraph V of the petition for the review, present, I think, only two questions for review: [13]

1. Can an officer of a bankrupt corporation be reimbursed for expenses incurred and services rendered to the trustee of the bankrupt estate at the request of the trustee and creditors or must such services as was rendered by Mr. MacDonald in this

case be and remain uncompensated and the expenses incurred in rendering that service be paid from his personal funds?

2. Was the allowance made to said MacDonald in the order complained of excessive?

The facts pertinent to a consideration of the questions herein presented are briefly as follows:

That at the request of the trustee and with the knowledge and consent of the creditors, Mr. A. M. MacDonald left his home in the city of Seattle, journeyed with Mr. H. B. Jones, one of the attorneys for the trustees, to Washington, D. C., for the purpose of presenting and prosecuting the claim of the bankrupt corporation against the United States Shipping Board Emergency Fleet Corporation; that in the prosecution of that undertaking Mr. MacDonald made two trips from Seattle to Washington D. C., and spent the greater portion of a year in the prosecution of said claim against the Emergency Fleet Corporation; that as a result of the efforts of the attorneys for the trustee and said MacDonald, the trustee received in settlement of said claim the sum of \$277,000.00 in cash and other considerations amounting to approximately \$50,000.00.

It was at all times during the prosecution of said claim represented to the referee and the creditors by the trustee and his counsel that the services of Mr. MacDonald were absolutely essential to the successful preparation and prosecution of said claim and at the creditors' meeting at which the order complained of was made, it was stated to the cred-

itors by counsel for the trustee that a large portion of the amount realized by the [14] trustee in the settlement of said claim would have been sacrificed and lost to the creditors but for the service of Mr. MacDonald. The creditors, including the Australian Government, were at all times kept fully advised of the services being rendered by Mr. MacDonald and the apparent necessity for his presence in Washington, and from time to time consented at creditors' meetings to payments being made to him by the trustee to apply on account of his said services and expenses, and payments were authorized by the creditors and made on account thereof aggregating \$6,500.00.

Under such circumstances it was idle, in my judgment, to contend that no compensation would be paid on account of the services rendered because Mr. MacDonald was a stockholder and officer of the bankrupt corporation.

If the services of one stockholder, an officer, such as was rendered by Mr. MacDonald in this case, could be required by the trustee and the benefits thereof received and retained by the creditors without compensation, there would be no reason why the trustee might not require such service of even more service from any or all stockholders and officers of the corporation without compensation.

I recognize the right of the trustee to require from the bankrupt or the officers of a bankrupt corporation such information as will enable him to properly administer the estate, but I do not understand that he can require and receive such exten-

sive services as were rendered without fair and adequate compensation being paid therefor.

On the question of whether or not the amount allowed was excessive I do not care to say anything except that Mr. MacDonald presented a claim to the trustee for \$7,406.00 for his expenses and \$20,000.00 for his services. The trustee made [15] this letter or demand a part of his report, and notice was mailed to all the creditors advising them of the claim presented by MacDonald and that the same would be considered at the creditors' meeting and an order made disposing of the same. Prior to the creditors' meeting I had given the matter considerable thought and at said meeting sought the opinion of the various creditors and attorneys present. No objection was made by any creditors except the Australian Government to the allowance of compensation to Mr. MacDonald and no one present at said meeting, except said creditor, objected to the amount of the allowance. I was of the opinion that Mr. MacDonald's claim for expenses was unreasonable and as there had been no showing of the items of expense I did not attempt to make any specific allowance for expenses but considered it advisable to make him an allowance for his services only which was in my judgment sufficient to take care of any legitimate expenses.

In fixing this compensation I had in mind two things,—first, the capable, intelligent effort extended by Mr. MacDonald in behalf of the estate over the long period of time in the prosecution of the claim against the Emergency Fleet Corpora-

tion and the very satisfactory results of those efforts, also the excellent and capable service and the time spent in collecting data and preparing for the litigation in connection with the liquidation of the claim of the Australian Government.

It will be observed that in the petition for review it is alleged that no sworn statement of the services rendered or expenses incurred was ever filed by MacDonald in the bankruptcy proceedings. I refer to this simply to state that that matter was not called to the attention of the referee or the creditors at the time the matter was under consideration and no point was made concerning same by counsel for the objecting [16] creditor at that time and I do not think it can be a proper subject for review unless it had been called to the attention of the referee at the time the matter was under consideration and besides as has been above stated the trustee and the creditors, including the objecting creditor, was fully advised at all times of the services required by the trustee and rendered by the said MacDonald; was advised of the payment of \$6,500.00 on account thereof. Mr. MacDonald as well as the trustee and his counsel were at the meeting and answered all questions concerning same that were asked by creditors or the referee.

I sent up herewith as the record in this case:

1. Exhibit "D," which was annexed to the trustee's report made prior to the meeting at which the order complained of was made.
2. The order complained of.
3. The petition for review.

Dated at Seattle, in said District, this 9th day of September, 1922.

Respectfully submitted,

C. R. HAWKINS,

Referee in Bankruptcy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 9, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6361—IN BANKRUPTCY.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

Petition for Review Regarding Paying Claim of A. M. MacDonald for Services.

The petition of the Commonwealth of Australia respectfully represents:

First: That heretofore on July 31, 1920, this petitioner duly presented its secured claim against the said bankrupt founded upon various breaches of a contract for the building by the bankrupt of ten ships for the petitioner, which said claim is now in process of adjudication, and this petitioner is a creditor of the said bankrupt having a provable claim against the said bankrupt's estate.

Second: That at a meeting of the creditors of the said bankrupt held on the 18th day of August, 1922, there was presented a claim of A. M. MacDonald for expenses and services rendered in connection with administering the estate of the said bankrupt, and that the said claim was, over the objection of this petitioner, allowed as an expense of administering the said estate in the sum of \$13,500.00, and thereafter upon the 23d day of August, 1922, an order was entered by the Honorable C. R. Hawkins, referee in bankruptcy, authorizing the payment of said claim, the same also being entered over the objection of this petitioner.

Third: That no sworn statement of services rendered, or of expense occurred, was ever filed in the said cause by the said A. M. MacDonald, or on his behalf, and the only representation which formed the basis of the said claim was [18] contained in the petition of the trustee filed herein to the effect that he had employed the said A. M. MacDonald to assist him in presenting a claim against the United States Shipping Board, Emergency Fleet Corporation, which said claim has been approved by the said Emergency Fleet Corporation and paid in the sum of something over \$277,000.00, and also in contesting the claim of this petitioner.

Fourth: That it further appeared that the said A. M. MacDonald was at the time of the adjudication in bankruptcy vice-president and general manager of the said bankrupt, and that the sole services rendered by the said A. M. MacDonald consisted in furnishing the trustee of the bankrupt with all

necessary information for the presentation of the said claim against the United States Shipping Board, Emergency Fleet Corporation and in contesting the claim of this petitioner.

Fifth: This petitioner claims that the said ruling and order of the said referee is erroneous for the following reasons:

1. There was no sworn statement, either oral or written, and no itemized statement of any kind made to form the basis of any claim herein as required by the bankruptcy act and the rules, and the practice of this court.

2. That there is no segregation in the order of the items, so it is impossible to determine how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.

3. That the said trustee or his attorneys were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatsoever for services to be rendered by [19] the said A. M. MacDonald.

4. That the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

5. That it is contrary to the letter and spirit of the bankruptcy act and the rules and the practice of this Court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

6. That the said allowance is excessive.

Sixth: That this petitioner desires a review by the Judge of this court of the said order made by the said referee, and files this petition therefor, and he therefore prays that the order complained of and the question of law and fact raised before the said referee and decided by him may be certified by the said referee to the district Judge of this court that he may review the said order heretofore made and make an order setting aside the said order of payment, and that the said sum of money and no part thereof be paid, and your petitioner ever prays.

COMMONWEALTH OF AUSTRALIA.

By SHANK, BELT & FAIRBROOK,

Its Counsel.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 9, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

Order for Disbursement.

WHEREAS, at a creditors' meeting duly called and held on Friday, August 18th, 1922, at the hour

of two o'clock P. M. at the office of the Referee in Bankruptcy, 1204 L. C. Smith Building, Seattle, Washington, the claim of A. M. MacDonald for allowance and payment on account of expenses incurred and services rendered on behalf of the trustee in connection with the prosecution of the claim of the bankrupt against the United States Shipping Board Emergency Fleet Corporation, and litigation with the Australian Government, and investigation and settlement of claims against the bankrupt, was duly considered and passed upon, and a total allowance made to him therefor of \$20,000, covering such services and expenses, whereof he has heretofore been paid the sum of \$6,500,

NOW, IT IS HEREBY ORDERED that the trustee be and he is hereby authorized and directed to pay to said A. M. MacDonald by his check as trustee herein, to be duly counter-signed by the Referee, the sum of \$13,500.00.

Dated at Seattle, in said District, this 23 day of August, 1922.

C. R. HAWKINS,
Referee.

Approved:

Judge. [21]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

**Order on Petition for Review on Allowance to
A. M. MacDonald.**

This cause came on to be heard at this term upon the petition of Mark Sheldon as Commissioner for the Commonwealth of Australia and the Commonwealth of Australia, to review an order made and entered by the Referee herein upon the 23d day of —, 192—, allowing and ordering payment to A. M. MacDonald of the sum of Thirteen Thousand Five Hundred Dollars (\$13,500.00), and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED and DECREED that said petition be and it hereby is denied, and the said order be and it is hereby approved, confirmed and sustained, in every respect.

Done in open court this 26 day of October, 1922.

JEREMIAH NETERER,

Judge.

To the foregoing the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Com-

monwealth of Australia, excepts, and their exception is allowed.

Oct. 26, 1922.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [22]

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Certificate of review on compensation to A. M. MacDonald petition for review, order of reference, order denying petition in the foregoing entitled cause, now on file and of record in my office at Seattle, Wash., and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court, this 15th day of December, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Frank L. Crosby, Jr.,

Deputy.

[Endorsed]: No. 6361—B. In the District Court of the United States for the Western District of Washington. In the Matter of Patterson-MacDonald Shipbuilding Company, a corporation, Bank-

rupt. (A. M. MacDonald and John L. McLean.)
Certified Copy of Referee's cert. on review. Order
of reference, petition for review, order of court
denying said petition. [23]

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of PATTERSON-
MacDONALD SHIPBUILDING COM-
PANY, a Corporation, Bankrupt,
Respondents.

Notice of Filing Petition for Review.

To Messrs. Bronson, Robinson & Jones, Attorneys
for the Above-mentioned Respondents.

YOU ARE HEREBY NOTIFIED that on the
26th day of December, 1922, at the opening of the
office of the clerk of the United States Circuit Court
of Appeals for the Ninth Circuit, in the City of
San Francisco, California, I will file in said office
a petition for review in the above-entitled cause, a
copy of which petition is hereto attached as a part

of this notice, and I will then ask to have the case docketed and the necessary order made therein to have the said case set down for hearing.

CORWIN S. SHANK,

Attorney for Said Petitioner Commonwealth of Australia.

We hereby accept service of the above notice this 21st day of December, 1922.

BRONSON, ROBINSON & JONES,

Attorneys for Said Respondents.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of Australia, Petitioner, v. A. M. MacDonald and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Respondents. Notice of Filing Petition for Review. [24]

[Endorsed]: No. 3961. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of Australia, Petitioner, vs. A. M. MacDonald and John L. McLean, as Trustees in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Respondents. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United

A. M. MacDonald and John L. McLean. 29

States District Court for the Western District of
Washington, Northern Division, and Transcript of
Record in Support Thereof.

Filed December 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt,

COMMONWEALTH OF AUSTRALIA,

Petitioner.

vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of Patterson-MacDonald
Shipbuilding Company, a Corporation, Bankrupt.

Respondents.

BRIEF OF PETITIONER
In Petition

Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, a
Certain Order of the United States District
Court for the Western District of Washington, Northern Division

CORWIN S. SHANK
Attorney for Petitioner

1002 Alaska Building

Seattle, Washington

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,
Bankrupt,

COMMONWEALTH OF AUSTRALIA,

Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of Patterson-MacDonald
Shipbuilding Company, a Corporation, Bankrupt.

Respondents.

BRIEF OF PETITIONER
In Petition

Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, a
Certain Order of the United States District
Court for the Western District of Washington, Northern Division

On March 19, 1920, the Patterson-MacDonald Shipbuilding Company was duly adjudged a bankrupt in the United States District Court for the Western District of Washington, Northern Division, upon its voluntary petition. The matter was referred to the

Honorable Cicero R. Hawkins as Referee in Bankruptcy and the respondent, John L. McLean, was duly elected trustee of the said bankrupt. Prior to the bankruptcy, the respondent, A. M. MacDonald had been a stockholder, official and chief managing agent of the bankrupt, (Record p. 9) and also the man who was familiar with the details of the business of the bankrupt.

At the time of the bankruptcy, the bankrupt had a large claim against the United States Shipping Board, Emergency Fleet Corporation, and the Commonwealth of Australia had a large claim against the bankrupt. The trustee and his attorneys made considerable use of Mr. MacDonald in prosecuting the claim of the trustee against the Emergency Fleet Corporation and in defending against the claim of the Australian Government. The result of the combined efforts of the trustee and his attorneys with the assistance of the information furnished by Mr. MacDonald, extending over more than a year's time, was that the claim of the trustee against the Emergency Fleet Corporation was settled by a cash payment of \$277,253.74, together with various other terms favorable to the trustee equivalent to about \$50,000, (Record p. 16), and the claim of the Commonwealth of Australia was rejected by the District Court and is now pending on appeal in this court. Respondent A. M. MacDonald during the progress of the proceedings had received from the trustee, pursuant to orders of the court, \$6500 on account of "expenses and services".

On July 20, 1922, respondent A. M. MacDonald presented to the trustee a bill in the form of a letter for \$20,000 (additional to the \$6500) as compensation for his services rendered in the prosecution of the claim against the Shipping Board and the defense of the claim against the Commonwealth of Australia. To this claim the petitioner interposed its objections, but such objections were overruled and the referee made to Mr. MacDonald an allowance of \$20,000 in a lump sum for his services and expenses, without any segregation of what was for his expenses from what was for his services, or of what services were in connection with the claim of the Shipping Board from what were his services in connection with the claim of Australian Government .

This petitioner thereupon filed its petition for review in the District Court (Record pp. 20-23) in which petition for review this petitioner claimed that the said rule and order of the referee were erroneous for the following reasons:

1. There was no sworn statement, either oral or written, and no itemized statement of any kind made to form the basis of any claim herein as required by the bankruptcy act and the rules, and the practice of this court.

2. That there is no segregation in the order of the items, so it is impossible to determine how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or

how much was allowed the said A. M. MacDonald for each service rendered.

3. That the said trustee or his attorneys were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatsoever for services to be rendered by the said A. M. MacDonald.

4. That the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

5. That it is contrary to the letter and spirit of the bankruptcy act and the rules and the practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

6. That the said allowance is excessive.

During the hearing before the District Court, on account of the somewhat indefiniteness of the referee's certificate, it was stipulated by the parties (Record p. 9) that the said respondent, MacDonald, was at and prior to the adjudication of the bankruptcy of the said bankrupt, a stockholder, officer and chief managing agent of the bankrupt, that no sworn statement had ever been made regarding the nature of the services rendered by the said A. M. MacDonald in the said bankruptcy proceeding, that there had been no segregation in the allowances for payment of expenses and for services, or for services in the matter of the two cases

and that in the event of the claim of the Commonwealth of Australia being finally rejected there would be a substantial sum of money left after paying all claims of creditors to be returned to the bankrupt corporation. Also at the hearing the said A. M. MacDonald was directed to file a sworn statement itemizing his expenses and this sworn statement, filed in accordance therewith, segregated his expenses by ascribing exactly \$214.50 to each one of four trips between Seattle and Washington, exactly \$7.50 for each day for his hotel bills, exactly \$5.50 for each day's meals, exactly \$2.00 for each day's tips and exactly \$4.50 for "other miscellaneous expenses, including luncheons, dinners, laundry, automobiles, etc.", making a total of expenses of exactly \$19.00 for each day consumed upon his trip to Washington (Record p. 11).

Upon the hearing had, however, the District Court entered its order, approving, sustaining and confirming the order of the referee in every respect. To this order this petitioner took due and proper exception and subsequently filed its petition in this court.

SPECIFICATIONS OF ERROR RELIED UPON

We respectfully submit that the order of the District Court was erroneous in the following particulars:

First: The court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that there was no segregation in

the order of the items so that it was impossible to determine from the said order how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.

Second: The court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that the said John L. McLean, trustee, in bankruptcy, nor his attorneys, were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatever for services to be rendered by the said A. M. MacDonald.

Third: The court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

Fourth: The court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that it is contrary to the letter and spirit of the bankruptcy act and the rules and practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

Fifth: The court erred in not sustaining the objections of these claimants to said order of the said

referee on the ground that the said allowance is excessive.

Sixth: The court erred in approving the order of the referee ordering payment to the said A. M. MacDonald in the sum of \$13,500.00.

ARGUMENT

All the above specifications of error merely go to the one proposition, and that is, that the order of allowance in question was erroneous. The claim for expenses is palpably and evidently false upon its face. It might be that Mr. MacDonald spent the entire sum of money upon this trip which he claims that he spent, but it would be absolutely impossible that he spent exactly \$2.00 on each and every day of his trip for tips, or exactly \$5.50 on each and every day for meals, or exactly \$4.50 on each and every day for incidentals.

When it comes to the question of services, the record is equally obscure.

The services rendered were absolutely intangible. Just what he did or how he did it was absolutely left unexpressed. The referee, however, states in his certificate that these services were "absolutely essential to the successful preparation and prosecution of said claim." It is not claimed that these services were rendered as an attorney or even as a technical engineering expert. In the face of the finding of the referee it

cannot be so claimed for the reason that however pre-eminent any individual might be, either as an attorney or as an engineering expert, it is absolutely impossible that no other person could ~~not~~ be found to take his place. The only possible explanation of the statement that Mr. MacDonald's services were "absolutely essential" that can be made is that Mr. MacDonald in his capacity as chief managing agent of the bankrupt had acquired and still retained details of the business which it was absolutely essential for the trustee and his attorneys to get in order to prosecute the one claim and defend against the other. In other words, the chief managing agent of the bankrupt had certain facts and it was necessary to bribe such managing agent and bribe him very liberally in order to get him to divulge those facts .

The Bankruptcy Act, however, meets this situation. Section 1 (19) of the Bankruptcy Act provides that: "'persons' shall include corporations, except where otherwise specified, and *officers*, partnerships, and women," while § 1 (4) provides that "'bankrupt' shall include a *person* against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt"; while § 7 (a) of the Bankruptcy Act provides that "the bankrupt shall * * * (3) examine the correctness of all proofs of claims filed against his estate * * * (7) in case of any person having to his knowledge proved a false claim against his estate,

disclose that fact immediately to his trustee * * * and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; * * * Provided, however, that he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence."

We thus see that both within the letter and the spirit of the Bankruptcy Act it is the duty of an official of a corporate bankrupt as much as of an individual bankrupt to furnish to the trustee all the information which he may have relative to the business affairs of the bankrupt so as to enable the trustee to administer the affairs of the bankrupt to the best possible advantage.

When the Patterson-MacDonald Shipbuilding Company became bankrupt its business was very much involved, but such a situation is very frequent in the bankruptcy courts. In order to administer an estate

it is absolutely essential that the trustee should have the benefit of all the information that the officers and employees of the bankrupt may be able to give him, and the Bankruptcy Act provides that the trustee may compel such information. It is true that the officers of the bankrupt can not be compelled to attend at other than certain places or at certain distances, but that is a provision that may be waived by the officer and upon attending at a distance, there is no question but what he is entitled to his expenses when properly claimed and he might also be entitled to a witness fee. Upon this theory the present petitioner made no objection to the various court orders which allowed Mr. MacDonald an aggregate of \$6500 on account of his expenses and services upon his extensive trips to Washington. It will be noticed, however, that none of these orders were a formal adjudication as to the amount he was to receive or a waiver of the right to insist upon a strict accounting as to his expenses. They were made merely on account, with the expectation that a proper expense account would subsequently be filed.

But is this court going to lay it down as a rule of law that the bankrupt of an estate which is involved in litigation can withhold the information which he has regarding the subject matter of that litigation until he receives from the trustee what he considers ample compensation for the furnishing of such information? If such is the law, it will be the first time it has ever appeared in the decision of any bankruptcy case, and it will open the door to a throng of claims on the part of

individual bankrupts and officers of corporate bankrupts for compensation for assisting the trustee in litigation regarding their estates.

But whatever might be said in favor of making to Mr. MacDonald an allowance as compensation for his trip to Washington, the same does not apply to giving him compensation for his services in connection with contesting the claim of the Australian Government. Under the Bankruptcy Act it is the express duty of a bankrupt to "examine the correctness of all proofs of claims filed against his estate" § 7 (3) "immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of this act that come to his knowledge", § 7 (6) and "in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee", § 7 (7). These duties were performed in the city of Seattle, Mr. MacDonald's place of residence and were exactly what, under the sections above quoted, he was required to perform.

There was some claim made before the referee that these provisions apply only to individual bankrupts and not to the officers of a bankrupt corporation, but under the definitions which we have heretofore quoted, contained in § 1 of the Bankruptcy Act, the term "bankrupt" includes the officers of a corporate bankrupt. Furthermore, if there is no duty upon the officers of a bankrupt corporation to perform the duties required under the bankruptcy act by an individual bankrupt, the hands of the bankruptcy courts

would be absolutely tied in the case of a corporate bankrupt. The duties which Mr. MacDonald performed in assisting in the contesting of the claims of the Australian Government were only those duties, performed at his place of residence, he was required to perform under the Bankruptcy Act. He was not entitled to be reimbursed for his expenses upon his trip to Washington because no proper statement of such expenses was ever furnished and the statement which was furnished was palpably false upon its face.

One exception taken by this petitioner was that no segregation of the allowance was made for these three different items: the expenses, the services in presenting the claim against the Shipping Board, and the services in contesting the claim of this petitioner. The order of the referee, however, which was approved by the District Court, lumped the three matters together and granted Mr. MacDonald \$20,000 in full for the entire claim. Even if he was entitled to compensation for his services in Washington, it was absolutely impossible to determine how much was allowed for this and how much for the other two items. Therefore, while it may be the law that the amount which a referee may allow for compensation is within the sound judicial discretion of the referee, nevertheless, where he makes an allowance for items which are clearly contrary to the Bankruptcy Act and these items are included in a blanket allowance so that it is impossible to separate the good from the bad, the situation is identical with that where in a jury trial, the court sub-

mits to the jury different elements of damage, one of which is correct and two of which are incorrect, and the jury brings in one general verdict. It is impossible to determine what was the allowance upon each item and therefore, the entire allowance must be set aside.

One of the exceptions which the petitioner took to the action of the referee in this case (which by the way was one which the referee absolutely ignored in his certificate), was that there was no sworn statement regarding this claim. The Bankruptcy Act expressly provides for the allowance of fees to attorneys for trustees and petitioning creditors and to trustees and referees, but there is no express provision in the Bankruptcy Act providing for fees for services to be allowed to the bankrupt for services rendered to the estate. The only guise under which such an allowance can possibly be made is that it is an expense of the trustee necessarily incurred in the administering of the estate, but § 62 provides that the expenses of administering the estate incurred by officers "shall, except where other provisions are made for the payment, be reported in detail under oath and examined or disapproved by the court". No slightest attention was paid by the referee to this section, and the exception of this petitioner upon this ground did not even so much as receive a mention in the referee's certificate.

A careful search of the reports fails to indicate a single instance where an officer of the bankrupt has ever been allowed any compensation for services rendered to the trustee, except one case which was cited by

the respondent in the lower court, being *In re Barrow*, 98 Fed. 582, where the bankrupt was allowed compensation for work and care bestowed upon crops after the date of his adjudication of bankruptcy. There could be no question but that this was a service which was necessary for the physical protection of the estate and the bankrupt would be as much entitled to pay therefor as any other person. The only cases in the district courts where claims have ever been made by bankrupts for compensation in connection with testifying and the like is the case of *In Re Barnes*, Fed. Cas. 1013, decided in the District Court for the Eastern District of Pennsylvania, Oct. 7, 1874, which opinion reads as follows:

“The bankrupts having made a claim for services rendered the estate, the same was disallowed by the register, whereupon they excepted to the register’s decision.

The Court said: ‘As to questions of special allowance to the bankrupts, or any of them, the court perceives no sufficient reason for directing such an allowance. This does not, however, necessarily preclude the allowance of something under this head by the creditors, of grace, if the bankrupts have rendered extraordinary services, beyond those required in order to make the property, rights, credits, and effects available.’”

In two cases, *In re McNair*, Fed. Cas. 8907, and *In re O’Kell*, Fed. Cas. 10,474, it was held that a bankrupt was not entitled to witness fees for attendance at his examination, and in two cases, *In re Lane Lumber*

Co., 206 Fed. 780, 783, and *In re Medina Quarry Co.*, 182 Fed. 508, it was specifically held that the attorney of the bankrupt was not entitled to an allowance for assistance rendered to the trustee in defeating claims where the trustee was also resisting such claims.

This is the entire case law upon this question although the present Bankruptcy Act has been in force for over twenty-five years, and during that time many bankrupts and officers of bankrupt corporations have given much of their time and energy in unraveling involved estates, but there is not a single reported case where compensation was even so much as claimed therefor except in these which we have just cited.

We respectfully submit that this allowance to Mr. MacDonald was clearly erroneous and should be set aside.

Respectfully submitted,

CORWIN S. SHANK,

Attorney for Petitioner.

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,
Petitioner,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of PATTERSON-
MacDONALD SHIPBUILDING COM-
PANY, a Corporation, Bankrupt,
Respondents.

ANSWER TO
Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the Western District
of Washington, Northern Division.

FILED

FEB 7 - 1923

F. D. MONKTON,
CLERK

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Attorneys for Respondents.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3961.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA,
Petitioner,
vs.

A. M. MacDONALD and JOHN L. McLEAN, as
Trustee in Bankruptcy of PATTERSON-
MacDONALD SHIPBUILDING COM-
PANY, a Corporation, Bankrupt,
Respondents.

Answer to Petition for Review.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Come now the respondents above named, and
without waiving, but reserving to themselves any
and all rights to move against the proceedings
herein, or to demur to the petition, for defects or
insufficiencies appearing upon the face thereof, re-
spectfully show unto the Court, for answer to said
petition, as follows:

I.

Referring to paragraph II of the petition, re-
spondents admit the presentation of a claim by the
petitioner against the bankrupt, and the disallow-
ance thereof, and the appeal from the order dis-
allowing the same, as therein alleged, and deny each

and every other allegation contained in said paragraph, and state that the entire facts relative thereto are as follows:

That upon the filing of said claim, the trustee filed written objections thereto upon several grounds, one ground of objection being that the said claim was unliquidated, and thereupon the petitioner applied to Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, for an order directing the manner of liquidating said claim; that thereupon, the District Judge, with the consent of the parties, entered an order designating and appointing Hon. C. R. Hawkins, Referee in Bankruptcy before whom the bankruptcy proceedings were and are pending, a Special Master to take evidence and make findings upon the questions arising out of petitioner's claim and the trustee's objections thereto, and submit his findings and conclusions to the District Court; that the Special Master proceeded in accordance with said order, and thereafter filed with the District Court his report finding that the bankrupt was not indebted to the petitioner, in any sum whatsoever, but that, on the contrary, it had overpaid the petitioner over and above all just charges due and owing at the time of bankruptcy by the sum of \$312,602.48; that said report of the Special Master was, after hearing and argument, duly approved and confirmed by the District Judge, upon which decision an appeal has been taken and is now pending; and respondents deny that petitioner has any valid claim whatsoever against the bankrupt.

II.

Referring to paragraph VI of said petition, the respondents state that in addition to the proceedings at said meeting of August 18th, 1922, there were at least three previous meetings of creditors of the estate of said bankrupt, duly called and held for the purposes of authorizing disbursements, and at which the petitioner was present or represented, at which allowances, upon account, were made to the said A. M. MacDonald upon account of and in connection with the services performed by him for which the allowance herein complained of was made, and that pursuant to the action taken at such meetings, three several disbursement orders were made, dated respectively, February 16th, 1921, June 1st, 1921, and October 7th, 1921, making allowances to said A. M. MacDonald upon account of services as well as expenses; that said orders are included in the transcript of the record upon the appeal taken by petitioner herein from the order of allowance herein sought to be reviewed, which record it is stipulated by the parties hereto may be considered in this proceeding; that no appeal from or review of said orders was ever prosecuted by the petitioner, either to the District Court or to this court.

III.

Referring to paragraph IX of said petition, respondents say that the affidavit filed by the said A. M. MacDonald was not filed by or in accordance with any stipulation, but under and by direction of the District Judge as a part of the hearing before him upon the petition for review of the order of the

Referee, as is more fully shown by the statement of evidence contained in the transcript of the record on the appeal taken by the petitioner from the order of allowance herein sought to be reviewed, which record it is stipulated by the parties hereto may be considered upon this proceeding.

WHEREFORE, respondents pray that the petition for review herein be denied.

A. M. MacDONALD,

JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation,

Respondents.

By IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

Attorneys for Respondents.

United States of America,

State of Washington,

County of King,—ss.

H. B. Jones, being first duly sworn, on oath deposes and says: That he is one of the attorneys for respondents above named, and has signed the foregoing answer on their behalf, being duly authorized thereto; and that he has read said answer and makes oath that the statements therein contained are true as he verily believes.

H. B. JONES.

Subscribed and sworn to before me this 22d day of January, 1923.

[Seal]

W. L. GRILL,

Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within answer admitted this 22d day of Jan., 1923.

CORWIN S. SHANK,
Atty. for Petitioner.

[Endorsed]: Answer to Petition for Revision,
etc. Filed Jan. 26, 1923. F. D. Monckton, Clerk.
By Paul P. O'Brien, Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation,
GEORGE L. BAKER, Mayor Thereof, and A. L.
BARBUR, JOHN M. MANN, C. A. BIGELOW
and S. C. PIER, Commissioners, and GEORGE
R. FUNK, Auditor Thereof, Also SCHOOL DIS-
TRICT No. 1, MULTNOMAH COUNTY, ORE-
GON, Including the CITY OF PORTLAND, a Body
Politic and Corporate, W. L. WOODWARD,
GEORGE P. EISMAN, FRANK L. SHULL,
W. J. H. CLARK, J. E. MARTIN, GEORGE B.
THOMAS and F. C. PICKERING, Directors of
said SCHOOL DISTRICT No. 1, and OREGON
REAL ESTATE COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

FILED

JAN 17 1923

F. D. MONCKTON,
CLERK.



United States
Circuit Court of Appeals

For the Ninth Circuit.

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation,
GEORGE L. BAKER, Mayor Thereof, and A. L.
BARBUR, JOHN M. MANN, C. A. BIGELOW
and S. C. PIER, Commissioners, and GEORGE
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THOMAS and F. C. PICKERING, Directors of
said SCHOOL DISTRICT No. 1, and OREGON
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Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

ISHAM N. SMITH, 418 Mohawk Building, Portland, Oregon, for the Appellant.

FRANK S. GRANT and H. M. TOMLINSON, City Hall, Portland, Oregon, for the Appellees City of Portland, George L. Baker, Mayor thereof, A. L. Barbour, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, and George R. Funk, Auditor of said City of Portland.

STANLEY MYERS and SAMUEL H. PIERCE, County Court, Portland, Oregon, for the Appellees School District No. 1, Multnomah County, Oregon, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed Citation on Appeal on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real State Co., personally at Portland, in

said District, on the 13th day of Decebmer, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [1*]

In the District Court of the United States for the
District of Oregon.

Case No. E—8617.

J. B. C. LOCKWOOD,

Plaintiff and Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor Thereof, A. L. BARBUR, Commissioner, JOHN M. MANN, Commissioner, C. A. BIGELOW, Commissioner, S. C. PIER, Commissioner, of said City of Portland, GEORGE R. FUNK, Auditor of said City of Portland; also SCHOOL DISTRICT No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS, and F. C. PICKERING, Directors of said School District No. 1, also OREGON REAL ESTATE COMPANY, a Corporation,

Defendants and Appellees.

*Page-number appearing at foot of page of original certified Transcript of Record.

Citation on Appeal.

The President of the United States, to the City of Portland a Municipal Corporation, George L. Baker, Mayor Thereof, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor of said City of Portland, and Frank S. Grant and H. M. Tomlinson, Attorneys Therefor, and also to School District No. 1 Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of said School District No. 1, and to Messrs. Stanley Myers and Samuel H. Pierce, Attorneys Therefor, and to Oregon Real Estate Company a Corporation:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of [2] Oregon, wherein J. B. C. Lockwood, plaintiff, is appellant, and The City of Portland, a municipal corporation, George L. Baker, Mayor thereof, and A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor thereof, also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic

and corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, directors of said School District No. 1, and Oregon Real Estate Company, a corporation, are appellees, to show cause, if any there be, why said decree in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable CHARLES E. WOLVERTON, Judge of the District Court of the United States for the District of Oregon, this 12th day of December, 1922, and of the Independence of the United States the one hundred forty-sixth, at Portland, Oregon.

CHAS. E. WOLVERTON,
Judge.

Service of the above and foregoing citation on appeal acknowledged and a copy thereof received this —— day of December, 1922.

_____,
Attorneys for Defendant City of Portland and Its
Commissioners and Auditor.

_____,
Attorneys for Defendant School District No. 1
Multnomah County, Oregon, and Its Directors.
OREGON REAL ESTATE COMPANY,

By _____. [3]

Service admitted. Portland, Ore., Dec. 12, 1922.

SAM'L H. PIERCE,

Of Attorneys for School Dist. No. 1 and Its Attorneys.

H. M. TOMLINSON,

Of Attys. for City of Portland, Its Commrs. and Auditor.

[Endorsed]: No. E—8617. 25—208. In the District Court of the United States for the District of Oregon. J. B. C. Lockwood, Plaintiff and Appellant, vs. The City of Portland et al., Defendants and Appellees. Citation on Appeal. U. S. District Court, District of Oregon. Filed Dec. 15, 1922. G. H. Marsh, Clerk. [4]

In the District Court of the United States for the District of Oregon.

July Term, 1922.

BE IT REMEMBERED, That on the 23d day of September, 1922, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit: [5]

In the District Court of the United States for the District of Oregon.

J. B. C. LOCKWOOD,

Plaintiff,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor

Thereof, A. L. BARBUR, Commissioner, JOHN M. MANN, Commissioner, C. A. BIGELOW, Commissioner, S. C. PIER, Commissioner, of said City of Portland, GEORGE R. FUNK, Auditor of said City of Portland; also SCHOOL DISTRICT No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and *Corporation*, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS, and F. C. PICKERING, Directors of said School District No. 1, also OREGON REAL ESTATE COMPANY, a Corporation,

Defendants.

Bill of Complaint.

Plaintiff alleges that—

I.

Plaintiff J. B. C. Lockwood is a citizen of the United States and a *bona fide* resident, citizen and inhabitant of the State of Washington.

The amount involved in this controversy exceeds three thousand dollars, exclusive of interest and costs.

The controversy herein involves individual and property rights guaranteed and protected by the Constitution of the United States, to wit, by Article XIV, Section 1, thereof, amendatory of the Constitution of the United States, which provides *inter alia*:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The controversy herein also involves individual and property rights guaranteed and protected by the Constitution of the State [6] of Oregon, to wit, Article I, Section 18, thereof, which provides:

“Private property shall not be taken for public use nor the particular services of any man be demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered.”

The controversy herein is wholly between citizens, residents and inhabitants of one state, to wit, this plaintiff who is a citizen, resident and inhabitant of the State of Washington, on the one part, as plaintiff, and all the defendants hereinafter named who are now and at the time of the commission of the grievances herein complained of were then *bona fide* citizens, residents and inhabitants of the State of Oregon.

II.

At and during all the periods of time named herein the defendant The City of Portland, Oregon, was then and now is a municipal corporation organized, created and existing under and by virtue of the laws of the State of Oregon.

The individual rights and property rights affected

by this case arise out of, relate to, are connected with, and depend upon, real property and easements therein situated within the said City of Portland, Oregon.

At the time of the commission of the grievances herein complained of defendant George L. Baker was then and now is Mayor of the defendant City of Portland, Oregon, and the defendants A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier were then and now are commissioners of said defendant City of Portland, and together with said Mayor constitute and are the council of said City of Portland, and when acting as such council are invested with the power and authority given by the laws and the charter of the City of Portland, and on behalf of said City the said City Council is authorized to and does exercise power, dominion and control over the various public properties as specified in and conferred by the charter of said City and ordinances passed by virtue thereof; [7]

That at the time of the commission of the wrongs herein complained of defendant, George R. Funk was then and now is auditor of the City of Portland, and as such is charged among other things with the duties as follows:

“An ordinance when passed by the council shall be signed by the mayor, or in his absence by the president of the council, and attested by the auditor, and shall be carefully filed and preserved and a record thereof made in a book kept for that purpose marked ‘ordinance record.’ ”

III.

At and during the periods of time named herein and especially at the time of the grievances herein complained of, the defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, was then and now is a body politic and corporate, organized, created and existing under and by virtue of the laws of the State of Oregon with its principal place of business at Portland, Multnomah County, Oregon, and the defendants, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, are now and were at the time of the commission of the grievances named herein the duly elected, qualified and acting board of directors of said School District.

IV.

During all the periods of time named herein, and since April 30, 1872, the defendant The Oregon Real Estate Company was then and now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon.

That said defendant was and is by its charter authorized to engage in, and was then and now is engaged in the enterprise business and pursuit and occupation described in its articles of incorporation, to wit: [8]

“The enterprise, business, pursuit and occupation in which this corporation proposes to engage, and in which it shall engage, is to pur-

chase, receive, take, hold, possess, improve, sell, convey, lease, mortgage, and in any other way or manner use and dispose of real estate of any and all kinds lying, or being any place within the limits of the State of Oregon; and also to improve any of such lands by fencing, clearing, grubbing, filling or otherwise, and by laying off by surveys or otherwise any or all parts or portions of such lands into lots and blocks, streets, alleys or public parks or squares, and by the erection of warehouses, mills, factories, machine shops, elevators, docks, wharves or other improvements, and generally to deal in real estate and do a real estate business in said State of Oregon, and all things necessary and convenient to be done in and about such business to carry on the same."

V.

The present limits and boundaries of said City of Portland embrace and include several municipalities which prior to their consolidation with the City of Portland about the year 1891 were then independent and separately organized municipalities, among which was one municipality known as and called the city of East Portland, Oregon, which from the date of its incorporation down to the consolidation of the City of Portland about 1891 was then a municipal corporation organized, created and existing under and by virtue of the laws of the State of Oregon.

Said City of East Portland embraced numerous lots and blocks separated and segregated by streets

and highways, and also embraced certain additions to said city, among which was Holladay Addition to East Portland which was dedicated as Holladay's Addition to East Portland by George W. Weidler by dedication deed and plat dated December 17, 1870, acknowledged December 17, 1870, and recorded December 17, 1870, in Book M of Deeds at page 302 and Book 1 of Plats at page 72 of the records of Multnomah Coutny, Oregon; and the blocks, the streets and alleys embraced within said plat were rededicated by a deed and plat of dedication executed by Samuel M. Smith, J. H. Mitchell and George W. Weidler dated February 1, 1871, acknowledged February 1, 1871, and recorded February 1, 1871, in Book M of deeds at page 634 and book 1 of Plats at page 73 of the records of Multnomah County, [9] Oregon.

That said deeds and plats of dedication have never been revoked or set aside; that the streets and public thoroughfares and the lots and blocks specified therein are still matters of record and still exist.

That since the consolidation of the City of East Portland with the City of Portland about 1891, said Holladay's Addition to East Portland has been and is commonly known as Holladay's Addition to Portland, Oregon, and is referred to as such in this complaint.

That by said original plat the streets running east and west in said addition are sixty feet wide except Holladay Avenue which is eighty feet wide, and "Pacific," "Oregon," "Willamette," and "Salem"

Streets are prolongations of the streets in Wheeler's Addition to East Portland and are fifty feet wide; the streets running north and south in said Holladay's Addition to East Portland are prolongations of the streets in East Portland and Wheeler's Addition to East Portland and are sixty feet wide.

By the amended deed and plat of dedication the streets running east and west in said addition are sixty feet wide, except Holladay Avenue which is eighty feet wide, "Pacific," "Oregon," "Multnomah" and "Salem" Streets are the prolongations of the streets in Wheeler's Addition to East Portland and are fifty feet wide; the streets running north and south are prolongations of the streets in East Portland and Wheeler's Addition to East Portland and are sixty feet wide.

That said streets designated on said plat and deed of dedication are still in existence under the original or under changed names thereof.

That plaintiff attaches to this complaint as Exhibit "A" a blue-print copy of said Holladay's Addition to East Portland, Oregon, and refers to said plat and incorporates the same herein as showing the location, direction, width and existence of the [10] various streets, public highways and blocks therein.

That the portions of the streets involved in this controversy are portions of Clackamas Street and East 8th Street hereafter designated which said streets are shown upon said plat Exhibit "A."

VI.

After making and recording of both said plats

and deeds of dedication, and by deed dated June 19, 1872, acknowledged June 19, 1872, recorded July 1, 1872, in Book S of deeds at page 327 of the records of Multnomah County, Oregon, George W. Weidler, former owner of the original Holladay's Addition to East Portland conveyed to the defendant, The Oregon Real Estate Company, the following described lands in said addition, with other lands, to wit: The following described parcel of real estate as shown upon the recorded map of Holladay's Addition to East Portland, County of Multnomah and State of Oregon, viz: Full Blocks 25, 55, 56, 59, 62, 66, 67, 68, 70, 71, 73, 74, 75, 77, 81, 82, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 135, 137, 138, 139, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, and such fractional parts of Blocks 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, and 213 as lies south of the claim line between William Irving and Jacob Wheeler's Donation Land Claim in section 35, Township 1 north range 1 east of Willamette Meridian.

Also lots 5 and 6 in Block 26, Lots 4, 5 and 6 in Block 43, Lots 1, 2, 7 and 8 in Block 47, Lots 1, 2, 7 and 8 in Block 49, Lots 1, 2, 7 and 8 in Block 50, Lots 7 and 8 in Block 51, Lots 5 and 6 and fractional Lots 3, 4, and 7 in Block 54, Lots 1, 2, 5, 6, 7 and 8 in Block 63, Lots 1, 2, 5, 6, 7 and 8 in Block 69, Lots 1, 2, 5, 6, 7 [11] and 8 in Block 78, Lots 1, 4, 5, 6, 7 and 8 in Block 79, Lots 1, 2, 3, 4, 7 and 8 in Block 80, Lots 5, 6, 7 and 8 in Block 90, Lots 1, 2, 5, 6, 7 and 8 in Block 99, Lots 3, 4, 5, 6, 7 and 8 in Block 136.

And whereas certain lots and blocks have been sold prior to this conveyance for which no deeds have been given but instead an agreement for the making of deeds when full payments have been received the same are hereby conveyed to the Oregon Real Estate Company as aforesaid on the condition only that when full payments are made and the said Oregon Real Estate Company shall be called upon for deeds thereof, they, the said Oregon Real Estate Company shall make good and sufficient warranty deeds to the following described parcels of real estate in lieu of the said agreements, viz: Full blocks 58 and 119.

Also fractional Blocks 53 and Lots 4 in Block 26, Lots 3 and 4 in Block 47, Lots 3, 4, 5 and 6 in Block 49, Lots 3, 4, 5, 6 in Block 50, Lots 3 and 4 in Block 69, Lots 3 and 4 in Block 78, Lots 3 and 4 in Block 99, all situate in and shown upon the recorded maps of Holladay's Addition as aforesaid.

VII.

Defendant School District No. 1, Multnomah

County, Oregon, owns Block 77 Holladay's Addition, bounded by East 6th and East 7th Streets, and by Clackamas and Halsey Streets in said Holladay Addition; it also owns Block 96 Holladay's Addition bounded by East 7th and East 8th Streets, and by Clackamas and Halsey Streets therein.

The defendant the Oregon Real Estate Company owns Blocks 95, 97 and 98 of Holladay's Addition and has entered a contract to sell said blocks to the defendant School District No. 1 of Multnomah County, upon the condition precedent that those portions of Clackamas Street lying between the East line of East Seventh Street north and the West line of East Ninth Street North, as shown on said Exhibit "A," and also that portion of East Eighth Street North lying between the South line of Halsey Street and the North line of Wasco Street, shown [12] on said Exhibit "A," shall first be vacated so that the said Oregon Real Estate Company may transfer such portions of said streets to the said defendant School District, in conjunction with said Blocks 95, 97 and 98 as School site and playground for the school children who may attend at Holladay School and that said School District contemplates the erection of a new school building upon certain portion of said entire premises and the devotion of the entire of said premises now owned by it as well as those blocks and portions of said streets to be so acquired by it, for such school purposes and for school playgrounds as aforesaid.

VIII.

The defendants, The Oregon Real Estate Company and the School District aforesaid, are attempting to carry out a plan for the sale to the School District of the lands and the portions of streets above designated, and in so doing said defendants acting together have sought and are seeking to induce the defendant the City of Portland, acting through its Mayor and Commissioners aforesaid, to enact ordinances providing for the vacation of those portions of East 8th Street and Clackamas Street heretofore designated.

The defendants, the School District and its Directors aforesaid, acting in conjunction with the defendant, The Oregon Real Estate Company, have presented to the defendant the City of Portland, and to its council consisting of its Mayor and Commissioners as aforesaid, and filed with its auditor George R. Funk aforesaid, petitions for the vacation of those portions of said streets above designated, a copy of which said petitions is attached hereto marked Exhibits "C" and "D," and have also presented to said City of Portland and to its council and mayor, defendants above named, a second petition signed by numerous persons who do not own property fronting on or abutting upon or within the designated area required for signers of petitions for the vacation of streets, a copy of which last named [13] petition is attached hereto and marked Exhibit "B," and all of said Exhibits "B," "C" and "D" referred to in this paragraph are prayed to be read as part hereof.

IX.

Said petitions respectively were filed with and are now on file with the defendant Funk as auditor of said city, and after the filing of said petitions and each thereof, and actuated thereby and acting thereon, the defendants the City of Portland and its Mayor and Commissioners above named gave notice of the time and place for hearing objections and protests against the vacation of said streets, to wit, September 15, 1922, at the council chamber in the City Hall of said City of Portland.

At the designated time and place remonstrances and objections were filed against the proposed vacation of the portions of said streets. Said City council heard said petitions and remonstrances and objections and overruled the same and accepted and received and filed the reports of certain of its officers to whom had been referred the matter of said petitions, and thereupon and on the 15th day of September, 1922, there was introduced before the council of the City of Portland, consisting of said defendant Mayor and Commissioners aforesaid, certain ordinances, copies of which are attached hereto marked respectively Exhibits "E" and "F," which in effect provide for the vacation of those portions of East 8th Street and East Clackamas Street so sought to be vacated as aforesaid, and for the surrender and cancellation of those portions of said streets and the cessation and abandonment of the use thereof, as streets;

That the objects and purposes of the vacation of those portions of said streets above designated are

(a) the abandonment and the vacation of said streets for street purposes;

(b) The tearing up and destruction of such portion of said streets;

(c) the transfer of those portions of said streets to private residential and school uses as specified in said petitions for vacation [14] thereof;

(d) the cancellation and surrender of all public rights and the destruction of the rights of all the citizens who have bought land in Holladay's Addition under said plats and deeds of dedication, to have, hold, exercise or enjoy any easements or rights of passage over and across said portions of said streets so sought to be vacated;

(e) And to deprive the public generally of the use of said streets for highway, thoroughfare or street purposes.

X.

At said meeting of said City Council on September 15, 1922, each and both of said ordinances so introduced was read the first and second time, and was passed to a third reading, and the third reading was by reference of the council specified for September 27, 1922, but said council of the City of Portland aforesaid claims the right to read said proposed ordinances and both of them a third time on any day after the 22d of September, 1922, to wit, on Saturday, September 23, 1922, and any day thereafter and said City Council claims to have the right to complete the enactment of said ordinances and to put them into immediate force and

effect by declaring the existence of an emergency therefor.

XI.

That no emergency in fact exists for the passage of said ordinances or either of them under the emergency power of the City council; that the portions of said streets sought to be vacated are not now nor were they ever, a menace to the public health, the public welfare or the public safety; neither that portion of said East 8th Street nor the portion of said Clackamas Street so sought to be vacated is dangerous to travel or unfit for travel, or has been abandoned by the public; that the City of Portland has means with which to keep up said portions of said streets and each thereof: That no public interest requires the vacation of either portion of either of said streets. [15] That those portions of East 8th Street and Clackamas Street so sought to be vacated are hard surfaced, are in first-class condition of repair, are safe for travel, are needed for travel, are used by the public generally as a means of ingress and egress and of transportation and as thoroughfares for passage from various parts of the City of Portland to other parts thereof, and that said portions of each of said streets are not inherently dangerous but are safe and are much used by the inhabitants of Portland generally and more especially by the residents of the City of Portland who have built homes within and who reside within the limits of Holladay Addition as aforesaid. .

XII.

That after the acquisition of the properties as shown in the deed from George W. Weidler to the defendant, The Oregon Real Estate Company, as above alleged, said defendant, The Oregon Real Estate Company, from the date of the acquisition of said properties thence hitherto, has been engaged in the business of selling and has sold numerous, divers and sundry lots, parcels of land and blocks theretofore owned by it in Holladay's Addition to various citizens, residents and inhabitants of Portland, Oregon, and to others including this plaintiff, and has based its sale, among other things, upon the representation of the existence of the streets, thoroughfares, public ways, parks and blocks as shown in the plat marked Exhibit "A" attached hereto; and said Oregon Real Estate Company has received large sums of money from its sales of said real estate and in every sale of real estate by said company it has represented to the purchasers, and now represents, that the streets, thoroughfares and public ways shown on the plat of Holladay's Addition attached hereto as Exhibit "A," will be forever open to immediate purchasers and to any subsequent purchasers and to the public generally for use as a means of ingress and egress and of transportation to and from [16] and throughout Holladay Addition, and to various parts of the City of Portland connecting therewith.

That all the streets shown upon said Exhibit "A" attached hereto are a part of the general system of streets, thoroughfares and public ways existing in

Portland, Oregon, and each of said streets connects with or intersects or opens a way of ingress and egress to and from other streets and thoroughfares of the City of Portland, Oregon.

That as an inducement to purchasers and as part of the consideration to purchasers from The Oregon Real Estate Company of the lands embraced within Holladay's Addition aforesaid, said defendant company has represented that the streets shown on said plat marked Exhibit "A" were in existence, were public streets, dedicated for public purposes, and would be maintained and were maintained as streets, thoroughfares and public highways and as a means of ingress and egress to and from and throughout Holladay Addition and the connecting thoroughfares of the City of Portland as above outlined.

XIII.

This plaintiff, J. B. C. Lockwood, purchased from the defendant The Oregon Real Estate Company by warranty deed dated April 6, 1908, recorded April 6, 1908, lots 1, 2, 7 and 8, of Block 99, of Holladay's Addition aforesaid, as per said plat, at the designated price of \$9,000, and as part of the consideration of said purchase The Oregon Real Estate Company, defendant herein, represented to this plaintiff that the streets shown on said plat marked Exhibit "A" were in existence and would be in existence, and were public streets and thoroughfares and highways and furnished a means of ingress and egress to and from his said property, and as a means of transportation from other portions of said Holladay Addition and as connecting

streets and thoroughfares of the general system of streets and highways of the city of Portland, Oregon, as heretofore alleged. [17]

XIV.

That the property so purchased by this plaintiff from the defendant The Oregon Real Estate Company, as above alleged, fronts on the south side of Wasco Street and corners upon the street intersection of Wasco Street and East 8th Street North, and is immediately adjacent to Wasco Street and in immediate proximity, to wit, within from 60 to 160 feet of the south termini of that part of East 8th Street so sought to be vacated, and is within 260 feet of certain portions of that part of Clackamas Street sought to be vacated as aforesaid.

This plaintiff objects to and protests against the vacation of those portions of East 8th Street North and of Clackamas Street affected by the proceedings hereinbefore described.

XV.

The defendant the City of Portland exercises its governmental functions including the power to vacate streets in virtue of a certain charter in effect July 1, 1913, as revised by the Council August 19, 1914, entitled

“AN ACT

To amend an Act of the Legislative Assembly of the State of Oregon entitled, ‘An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,’ filed in the office

of the Secretary of State, January 23, 1903, amended by the Legislative Assembly of the State of Oregon in 1905 and subsequently amended by the people of the City of Portland, providing for a commission form of government.

BE IT ENACTED BY THE PEOPLE OF THE CITY OF PORTLAND, AND THE CITY OF PORTLAND DOES ORDAIN AS FOLLOWS:

That an Act of the Legislative Assembly of the State of Oregon entitled, 'An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State January 23, 1903, and subsequently amended, by the legislative assembly of the State of Oregon in 1905 and subsequently amended by the people of the City of Portland, be and the same is hereby amended as hereinafter set forth, providing for a commission form of government,"

of which this plaintiff makes profert and craves oyer at the hearing [18] of this cause and tenders copy thereof for use throughout this case.

The provisions of said charter concerning the vacation of streets are as follows, to wit:

Section 3: "The City of Portland shall be invested within its limits with authority to perform all public and private services, including those of an educational or recreative character

as well as others, and with all governmental powers except such as are expressly conferred by law upon other public corporations within such limits and subject to the limitations prescribed by the constitution and laws of the State, and to acquire by purchase or otherwise property without its limits."

Section 7: "The title, rights and interest of the City of Portland in and to all water front, wharf property, land under water and made land built upon same, or any lands on the water side of the high water or meander lines of navigable waters as established by the original U. S. surveys and conformed to by the original plats of the City of Portland, and all landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks and all other public places, and like property that it may now own or hereafter may acquire are hereby declared to be inalienable. The rights of the City therein shall not be divested or vacated for a distance of two thousand feet from any meander line of any navigable water, or one thousand feet from any railroad depot or terminal yard; *provided, that at a greater distance than specified above from any such meander lines and railroad terminal streets may be vacated on proceedings prescribed elsewhere in this Chapter, except that the ordinance of vacation shall require for its passage a vote of at least four fifths of all the members of the Council and the approval of the Mayor. But whenever the City shall own*

all the property abutting upon both sides of any part of a street, and such part of the street shall be necessary for the use of such property of the city for a public purpose the street may be vacated in the manner elsewhere provided in the Charter or the laws of the State of Oregon in force at the time for the vacation of streets; provided, however, that the right herein granted shall only be exercised when such vacation shall not interfere with any improvement proposed by the Dock Commission or with access to the water front or any transportation terminal. But replatting of streets in such manner that new ground is dedicated or required without additional cost to the City of equal area with that vacated, and affording equal way and access to the same terminus, shall not be deemed within the prohibition of this act."

Section 8 (*inter alia*): "A street shall be held to fulfill its function as a street by being used in any way for the purpose of travel, transportation or distribution by or for the public."

Section 48: "Ordinances (a) making appropriations and the annual [19] tax levy, (b) relative to local improvements and assessments therefor, and (c) emergency ordinances, shall take effect immediately upon their passage. All other ordinances enacted by the Council shall take effect thirty days after their passage, unless a later date is fixed therein, in which event they shall take effect at such later date,

subject to the referendum and subject to the provisions of Section 52 of this Charter.”

Among the powers continued in force from the charter of 1903, under the existing charter of the City of Portland are the following:

“The Council has power and authority, subject to the provisions, limitations and restrictions in this charter contained:

(12) To provide for the opening, laying out, establishing, altering, extending, vacating and closing or for establishing and changing the grades of streets, squares, parks, public places, and to provide for the improving and repairing of streets, squares, parks and public places or of any land over which any right of way has been obtained, or granted for any purpose of public travel by means of any kind of work, improvement or repair mentioned in this Charter, subject to the provisions and limitations contained in this Charter, and in the Constitution of the State of Oregon.”

Section 77: “As Clerk of the Council, the Auditor shall keep a correct journal of its proceedings, and shall file and keep all books, papers and maps connected with the business of the Council.”

This plaintiff is informed and believes, and so alleges, and states the truth to be, that said charter of the City of Portland does not at any place prescribe the proceedings to be followed in the vacation of any street.

Section 284 of said charter provides:

“That so much of Sections 346 and 347, 348, 349 and 350 as heretofore amended, and of Sections 362 to 421, both inclusive, of the Charter of 1903, as is not inconsistent with the provisions of this Charter shall remain in full force and effect as ordinances only subject to repeal and amendment and to the enactment of new legislation by the Council in the manner and subject to the restrictions in this Section provided upon the subject of improvements of whatever nature to be paid for by local assessment. Such Sections shall be known as the Local Improvement Code. No repeal of any portion thereof, amendment thereto nor new legislation upon the subject shall be made by the Council except by ordinance which shall be published in full and in its final form in the City Official Newspaper at least thirty days before its final passage. Notice [20] shall be given in the City Official Newspaper and by publishing conspicuous advertisements in one or more daily papers published in the City of Portland having a circulation of not less than 1500 not less than five times, the last of such notices to be published not less than ten days before the final adoption of any such amendment, repeal or new legislation. Upon the adoption of any amendment to or the repeal of any part of such Local Improvement Code or the adoption of any new legislation upon the subject, the whole Local Improvement Code

shall be printed in pamphlet form and the Auditor shall be furnished with a sufficient number of copies thereof for distribution to all persons inquiring for the same. The Council, in the exercise of its general legislative powers, may provide in its discretion for the performance of any public work by or on behalf of the City and for the method of payment thereof, but said Local Improvement Code must provide for the giving of not less than ten days' notice by publication, or by mailing to persons interested, (a) of any intention to make any improvement, and (b) of any proposed assessment against property owners for the same, and the right shall be preserved to the owners of sixty per centum in extent of the property affected by any assessment for a local improvement except for street opening or sewers to defeat the same by remonstrance."

Plaintiff further alleges that no new legislation or no new codification has ever been made, or enacted by the City of Portland, upon said subject, or any appeal of the Local Improvement Code ever been attempted.

Plaintiff further alleges that said section 362, 363, and 364 of the Charter of 1903 referred to above, which are continued in full force and effect as an ordinance only, and not as a part of the Charter, read as follows:

"Section 362. Whenever any person or corporation interested therein shall desire the vacation of any street, or part thereof, within the

City of Portland, the person or corporation so desiring said vacation shall give notice, by advertising thereof, for four consecutive weeks, in the City Official Newspaper that at a regular meeting of the Council of the said City, to be had at the time stated in such notice of publication, a petition will be presented to the Council praying for the vacation of such street, or portion thereof, particularly describing the same. The petition, so to be presented to the Council shall set forth a description of the part of the street proposed or sought to be vacated, and the purpose for which the ground is proposed to be used, *and the reason for such vacation*, and there shall be appended to such petition, as a part thereof, and as the basis for such vacation, and as a *basis for the granting of the prayer of such petition*, the consent of the owners *in fee simple*, of at least two-thirds of the real estate *fronting on both sides of said street* which or part of which is proposed to be vacated, estimated upon the frontage of the street, such frontage to commence at a line [21] drawn equidistant from the termini of the street, or portion thereof, proposed to be vacated, and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, unless such street shall not be continuous in either direction, in which case the consent of the owners above provided for shall only be required for the distance that it is continuous;

provided, that in the vacation of a plat it shall require the consent of the owners of two-thirds of all the real estate fronting on the streets designated on such plat. The consent of the owners of the requisite number of front feet hereinbefore required to be attached to the petition for the vacation of a street shall be given in writing and duly acknowledged before an officer authorized to take acknowledgments, and such consent shall be attached to the petition for such vacation, and such petition and consent shall be filed with the Auditor. The Council shall, upon the presentation of such petition, and the filing of the proof of the due publication of the notice herein prescribed with the Auditor, fix a time for hearing said petition and objection thereto, if any be filed. At the time fixed by the Council for hearing said petition, and the objections filed thereto, if any, the Council shall ascertain and determine whether the consent of the owners of the requisite number of front feet has been obtained as aforesaid, and such finding shall be made a matter of record, and shall be conclusive of the facts as found in all collateral proceedings, and shall be *prima facie* evidence of the facts in all direct proceedings. If upon such hearing the council shall find that the public interest would not be prejudiced by the vacation of such street, or part thereof, applied for, and that the consent of the owners of the requisite number of front feet has been obtained,

as hereinbefore provided, the Council may grant the prayer of the petitioner in whole or in part, and may vacate the street sought to be vacated by such petition, and cause such vacation to be made a matter of record.

“Second 363. If upon the hearing of the petition for the vacation of such street, or part thereof, as in the preceding section provided for, the Council shall determine that such street should be vacated, and shall by ordinance vacate the same, and such street shall be attached to the lots or ground bordering on such street, and all right and title thereto shall vest in the owners of the property on each side thereof in equal proportions. In every case where a street shall have been originally dedicated wholly by the owner or owners of the property abutting upon one side only of such street, then in the event of the vacation of such street all right and title thereto shall vest in the then owner or owners of the property abutting upon the side of the said street last aforesaid.

“Section 364. The vacation of any street by the Council shall only be made by ordinance, and a certified copy of such ordinance shall be filed for record, and duly recorded, in the office of the County Clerk of Multnomah County, and said County Clerk shall record the same in the records of deeds for said county and place an appropriate reference upon the margin of the original plat or plats of said street, or part

thereof vacated, to indicate the book and page where such vacation is recorded.

“No street shall be vacated upon the petition of any person or corporation whereby such petition it is proposed to replat [22] or rededicate any street or streets in lieu of the original plat or streets, unless such petition shall be accompanied by a plat showing the proposed manner of replatting of the street, alleys or highways to be dedicated in lieu of the street or streets asked to be vacated, and attached to which proposed plat or dedication there shall be the sworn affidavit of the person proposing to make such new plat or dedicate such street for highways, that such proposed plat or dedication of streets will be made immediately upon the vacation prayed for in the petition in consideration thereof.”

That unless restrained by order of this Court, said defendants, the City of Portland and its Mayor and Commissioners, members of its city council aforesaid, will place said ordinances marked E and F and attached to this complaint upon their final passage, and that said Mayor of said City of Portland on September 15, 1922, announced in the presence of said councilmen and in open council, and after said ordinances had been read the first and second times, that said ordinances could not come up for final passage until the eighth day thereafter, and that the members of said council, meaning the Commissioners and the Mayor of the City of Portland as aforesaid, were not likely to change their

minds on said subject, and gave assurance of the final passage of both said ordinances.

That said Mayor and Commissioners, constituting the council of the City of Portland, threaten to, and unless restrained by this court will, finally pass said ordinances attached hereto as Exhibits "E" and "F," and will file the same with the defendant Funk as auditor aforesaid, and will vacate and cease to use said portions of East 8th Street and East Clackamas Street heretofore described, and will permit the defendants, the School District aforesaid and the directors thereof, and the defendant the Oregon Real Estate Company, to tear up and destroy such portions of said streets and to render such portions of said streets unfit for public use or travel, and will prevent the public generally and more particularly this plaintiff from using said portions of said streets for street or highway or [23] thoroughfare purposes, and will deny to this plaintiff his rights of easement therein and thereto and his rights of passage, and ways of ingress and egress thereover, and thereby will deprive plaintiff and his property of his free rights of ingress and egress to and from and over the various portions of said streets connecting with the streets of the City of Portland, although vacation of said portion of said streets does not completely deprive this plaintiff of all his ways of ingress and egress to his property.

XVI.

That the proposed dedication of said streets as contemplated and the actual vacation thereof, if

made, is void, and is an infringement upon and an invasion of the property and property rights of this plaintiff, and will result in depriving this plaintiff of his property and property rights without due or any process of law, in this

(1) That by each of said petitions for the dedication of said streets the purposes of said petition are stated therein and shown as a purpose to acquire said street property for private purposes.

(2) That each of said petitions shows the respective part of each street so sought to be vacated to be a public street, and neither of said petitions shows any public or other necessity for the vacation of any part of either of said streets.

(3) That neither petition shows that the vacation of either part of either of said streets is necessary to protect the public health, the public safety, the public peace or the public welfare.

(4) That neither of said petitions shows that the vacation of either portion of either street is due to the inability of the City of Portland to maintain either portion of either of said streets.

(5) That neither petition for the vacation of either part of either of said streets shows that the portions of said streets sought to be vacated has been abandoned or has fallen into disuse or is not necessary or convenient as a means of ingress and egress [24] to other portions of the streets and highways of Portland, Oregon; or that either part of either street affected by the proceedings complained of, has ceased to fulfill its functions, as de-

fined in Section 8 of the charter of the City of Portland aforesaid.

(6) That neither of said petitions shows any emergency or any public necessity or any public right affected by the existence of such portion of said streets or requiring the vacation thereof.

(7) That the petition for the vacation of each respective part of each street is signed by The Oregon Real Estate Company, defendant herein, and that said company together with School District defendant herein, signs each and both of said petitions, and that said The Oregon Real Estate Company by reason of the matters herein set forth, and of its deed to this plaintiff, and of its sale of its property in Holladay's Addition, based upon the plat marked Exhibit "A" herewith, and upon the representations of the streets, thoroughfares, parks and blocks as per said plat, became, is and ought to be, estopped from petitioning for the vacation of any of said streets shown on said plat; and that the signing of said petition by said defendant The Oregon Real Estate Company is a fraud and a wrong upon this plaintiff's rights and upon his easements and his vested property rights acquired under his deed aforesaid, and is a breach of covenant of the warranties contained in said warranty deed which plaintiff obtained from the defendant The Oregon Real Estate Company as heretofore alleged, and that if said The Oregon Real Estate Company is prevented from signing said petition and its signature thereto held for naught then said petitions and each thereof is void as neither of said petitions will

then contain the requisite signatures for the vacation of said street as provided in the ordinance heretofore set forth.

That except and but for the signing of said petitions and each thereof by the defendant The Oregon Real Estate Company the signature to said petitions and each of them is manifestly insufficient to procure the vacation of each portion of each street involved herein, under the provisions of the ordinance heretofore quoted. [25]

(8) That said petition for the vacation of the portion of East 8th Street herein described does not contain the signature of the owners of two-thirds of the property affected by the proposed vacation, as defined in the ordinance heretofore quoted.

(9) That by this procedure an attempt is made to have the City council of Portland, Oregon, take property which is already devoted to one public use, and without reason for the cessation of such public use to convert such property to the use of the Oregon Real Estate Company—a private corporation—for sale to the defendant School District which is a different political organization from the City of Portland and so to manipulate said property that the defendant The Oregon Real Estate Company may make a private transaction predicated upon the vacation of said streets and may receive compensation from the defendant the School District, therefor.

(10) That by the proposed vacation of said streets an attempt is made to deprive this plaintiff

of his property and property rights without compensation and without condemnation and such proposed vacation of such portions of said streets is an invasion of this plaintiff's property and property rights and is a denial to him of his rights guaranteed by amendatory Article 14, Section 1 of the Constitution of the United States heretofore quoted and of Article 1, Section 18, of the Constitution of the State of Oregon heretofore set out.

(11) That the defendants and each of them are acting together and are attempting to take from this plaintiff his property and property rights without due or any process of law and are seeking through the Legislative and executive departments of the City of Portland to pass a judgment which will take from this defendant his property and property rights without compensation and without process of law, contrary to the provisions of those sections of the Constitution of the United States and of the State of Oregon heretofore quoted.

(12) That the defendants herein, and each of them, by reason [26] of all the matters herein set forth, are of right and ought to be estopped from attempting to vacate said portions of said streets herein referred to; that the defendants have deliberately and purposely undertaken to vacate those portions of said streets herein referred to, with knowledge and means of knowledge of the matters of record set out in this complaint and of plaintiff's right by virtue thereof.

(13) That defendant the City of Portland and its Mayor and Commissioners aforesaid threaten

to pass said ordinances hereinbefore referred to and to give effect thereto, and thereby the defendants and each of them are acting together and for a common purpose and threaten to and will, unless restrained by this court, deprive this plaintiff of his rights and property rights as heretofore set forth.

(14) That the said Ordinances seek to impair and if they are passed and become effective they will impair the obligation of the contract, to wit, the warranties and covenants contained in the said warranty deed from the defendant, The Oregon Real Estate Company, to this plaintiff, heretofore referred to and thereby the defendants threaten to, and by the passage and enforcing of said ordinances, they will violate a provision of the Federal Constitution, to wit, Article I, Section 10, reading

“No state shall * * * pass any law impairing the obligation of contracts.”

XVII.

That the vacation of said portion of each of said streets will cause plaintiff immediate and irreparable loss, before this matter can be heard on notice, and that if the vacation of such streets is accomplished by the passage and enactment of such ordinance and becomes effective, that this plaintiff will lose and be deprived of his easements in and to said portions of said streets, and thereby will be deprived of part of the consideration for his said deed as heretofore alleged, and that [27] plaintiff has no other plain, speedy or adequate remedy at law or otherwise to protect his rights save by an

injunction issued out of this court directed to the defendants and each of them, and to their and each of their servants, assistants, agents, attorneys, deputies and employees, and to all persons acting in aid of them or either of them, restraining and preventing them and each of them from passing said ordinances, or if said ordinances are passed before the issuance of this injunction herein, from giving effect thereto.

XVIII.

That plaintiff institutes this suit on his own behalf and on behalf of all other property owners in Holladay Addition similarly situated as plaintiff, and requests that such other property owners therein as may hereafter seek to join him may be permitted to do so and to litigate these matters as a class.

WHEREFORE plaintiff, J. B. C. Lockwood, prays decree as follows:

(1) That a temporary restraining order be issued upon the filing of this complaint and be directed to the defendants, to wit: The City of Portland, a municipal corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate; W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, directors of said School District No. 1, also

Oregon Real Estate Company, a corporation, and to each of them, and to their and each of their deputies, attorneys, agents, assistants and employees, and to all persons acting in aid of them, or either of them, commanding them and each of them to desist and refrain from attempting to pass said ordinances referred to herein, or either of them, and from attempting to vacate or from vacating those portions of East 8th Street and of Clackamas Street hereinbefore [28] referred to until the further order of this court.

(2) That a time and place be set for hearing of said temporary restraining order, and that upon hearing thereof said temporary restraining order be continued in force during the pendency of this cause.

(3) That upon the final hearing of this cause said temporary restraining order and injunction be made perpetual by the decree to be rendered herein, and that by said decree the defendants above named, and each and every of them their and each and every of their deputies, attorneys, agents, assistants and employees, and all persons acting in aid of them, or either or any of them, be absolutely and forever restrained and prohibited from in any manner attempting to vacate those portions of East 8th Street and Clackamas Street, above described, and from interfering with the property and property rights of plaintiff as herein set forth.

(4) That the proceedings to vacate said portions of said streets be declared void and of no effect.

(5) That this complaint, verified, be treated as an affidavit upon which said temporary restraining order and the injunction thereafter to be issued, if any, shall be issued in this case.

(6) That this plaintiff have such other relief in the premises as is just and equitable with costs; and plaintiff will ever pray.

(Duly verified by counsel.)

ISHAM N. SMITH,
418 Mohawk Building,
Portland, Oregon. [29]

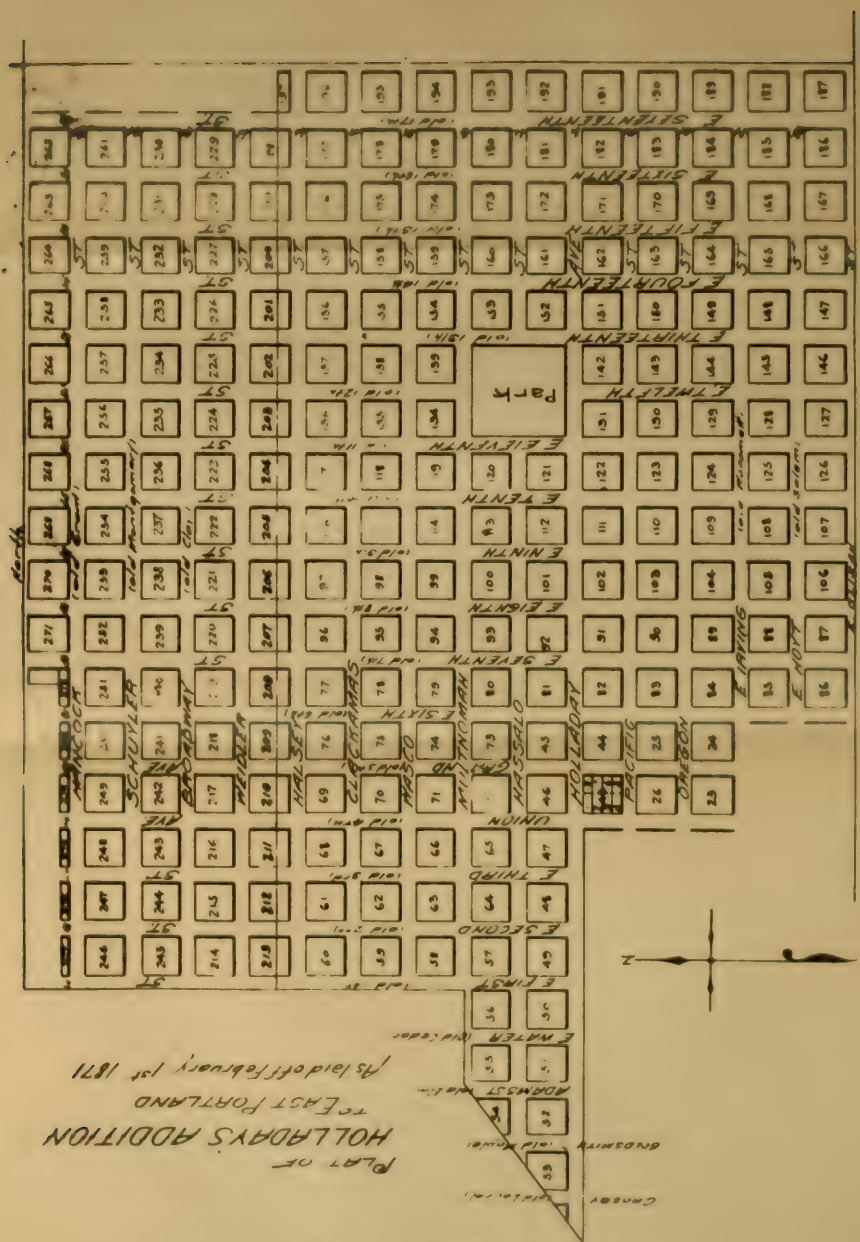


EXHIBIT "A"

Exhibit "B."

Portland, Oregon, September 9, 1922.

To the Honorable Mayor and City Commissioners,
City of Portland,
Portland, Oregon.

Gentlemen:

At a meeting held at the Halladay School on Friday evening, September 8th, 1922, many residents of the district adjacent to the Holladay School being present, the question of the new Holladay School as proposed by the Board of Directors of School District No. 1, was discussed, particular importance and stress being laid on the matter of vacation of Clackamas Street between the west line of East 9th Street and the east line of East 7th Street; also East 8th Street between the south line of Halsey Street and the North line of Wasco Street.

It was the unanimous opinion of those present that these streets should be vacated in order to give adequate ground area for a school building and playgrounds. Particular importance was laid to the question of safety of the children who attend this school.

Therefore, we, the residents of the district adjacent to the proposed new Holladay School and residents of the City of Portland, petition your honorable body to proceed with the vacation of the streets above mentioned in order that School District No. 1 may proceed with the erection of the new Holladay School as originally planned.

(Said petition was marked Filed Sept. 15, 1922,
Placed on file.) [31]

Exhibit "C."

Portland, Oregon, August 4, 1922.

To the Honorable Mayor and Council of the City of
Portland, Oregon.

Gentlemen:

Now comes the undersigned, who desires the vacation of a certain portion of East 8th Street in the City of Portland, Multnomah County, Oregon, and respectfully shows:

That a particular description of the portion of said East 8th Street which petitioner herein desire to have vacated is all that portion of said East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street.

That the purpose for which the ground is proposed to be used which your petitioner herein seeks to have vacated is for general private purposes the same as the adjacent ground and particularly for residential purposes and school purposes.

That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the west being block 96, the said School District contemplates the purchase of blocks 96, 97 and 98 of Holladay Addition and on which the proposed new Holladay School is to be located and the vacation of that portion of said street will add to and be beneficial to the public in connection with the said school.

That there is appended to this petition as a part

thereof and as a basis for such vacation and as a basis for the granting of the prayer of this petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said East 8th Street which is proposed to be vacated estimated upon the frontage of the street, such frontage to commence at a line drawn equidistant from the termini of the portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof; that said consent is in writing and duly acknowledged before an officer authorized to take acknowledgments and said consent is attached to this petition marked Exhibit "A" and made a part hereof.

Wherefore, the undersigned, petitioner prays that upon the publication of due notice and proof of the same in accordance with the provisions of the ordinances of the City of Portland the portion of said East 8th Street hereinbefore described be vacated. [32]

Name of Owner.	Description of Property.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Block 96 Holladay Addition.

(Corporate Seal.)

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, being owners of the respective lots and parcels of land set opposite our respective names, do hereby consent to the vacation of that portion of East 8th Street in the City of

Portland, Multnomah County, State of Oregon, lying between the south line of Halsey Street and the north line of Wasco Street and we do hereby represent and guarantee that we are lawfully seized in fee simple of the property set opposite our respective names.

IN TESTIMONY WHEREOF we have duly executed this instrument this 4th day of August, 1922.

Name of Owner.	Description of Property.
The Oregon Real Estate Company, by H. S. Reed, Secretary,	Lots 7 and 8 Block 94 Holladay's Addition to East Portland, also Blocks 95, 97 and 98 in Holladay Addition to East Portland.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Block 96 Holladay Addition.
Fred Jennings,	Block 94, Lots 5 and 6 Holladay Addition.

(Duly acknowledged by the Oregon Real Estate Company by School District No. 1 of Multnomah County, and by Fred Jennings.) [33]

Exhibit "D."

Portland, Oregon, August 4, 1922.

To the Honorable Mayor and Council of the City of Portland, Oregon.

Gentlemen:

Now comes the undersigned, who desires the vacation of a certain portion of Clackamas Street in the City of Portland, Multnomah County, Oregon, State of Oregon, and respectfully shows:

That a particular description of the portion of said Clackamas Street which petitioner herein desires to have vacated is all that portion of said Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street.

That the purpose for which the ground is proposed to be used for which your petitioner herein seek to have vacated, is for general private purposes the same as the adjacent ground and particularly for residential purposes and school grounds.

That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the north, being block 77 and 96, and the said School District contemplates the purchase of Blocks 95, 97 and 98, of Holladay Addition and on which the proposed new Holladay School is to be located, and the vacation of that portion of said street will add to and be beneficial to the public in connection with said school.

That there is appended to this petition as a part thereof and as a basis of such vacation and as a basis for the granting of the prayer of this petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of the said Clackamas Street which is proposed to be vacated, estimated upon the frontage of the street, such frontage to commence at a line drawn equidistant from the termini of the portion of the said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof; that said consent is in

writing and duly acknowledged before an officer authorized to take acknowledgments and said consent is attached to this petition marked Exhibit "A" and made a part hereof.

Wherefore, the undersigned, petitioner prays that upon the publication of due notice and proof of the same in accordance with the provisions of the ordinances of the City of Portland the portion of said Clackamas Street hereinbefore described be vacated. [34]

Name of Owner.	Description of Property.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Blocks 77, 96 Holladay Addition.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned being the owners of the respective lots and parcels of land set opposite our respective names, do hereby consent to the vacation of that portion of Clackamas Street in the City of Portland, Multnomah County, State of Oregon, lying between the west line of East 9th Street and the east line of East 7th Street and we do hereby represent and guarantee that we are lawfully seized in fee simple of the property set opposite our respective names.

IN TESTIMONY WHEREOF we have duly executed this instrument this 4th day of August, 1922.

Name of Owner.	Description of Property.
The Oregon Real Estate Company, by H. S. Reed, Secretary.	Lots 1 and A Block 115 in Holladay's Addition to East Portland, also Blocks 95, 97 and 98 in Holladay Addition to East Portland.
School District No. 1, Multnomah County, Oregon, by F. L. Shull, Chairman, by R. E. Fulton, School Clerk.	Blocks 77 and 96 Holladay Add.

(Duly acknowledged by the Oregon Real Estate Company. Duly acknowledged by School District No. 1 of Multnomah County, Oregon.)

(Said petitions and each of them are marked filed Sept. 8, 1922. George R. Funk, Auditor of the City of Portland. By E. W. Jones, Deputy.) [35]

Exhibit "E."

ORDINANCE No. —.

An Ordinance vacating that portion of East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street.

WHEREAS, due notice has been given by advertisement thereof for four weeks, to wit, from August 10, 1922, to September 7, 1922, both dates inclusive in the Daily Record-Abstract, the City Official Newspaper, published in the City of Portland, Multnomah County, State of Oregon, that at a regular meeting of the Council of said City to be held on the 13th day of September, 1922, a petition would be presented to said Council praying for the vacation of that portion of East 8th Street lying between the south line of Halsey Street and the north line of Wasco Street, in the City of Portland,

Multnomah County, State of Oregon, which said notice, together with due proof of publication thereof was filed in the office of the Auditor of said City of Portland on September 12, 1922, prior to the presentation of said petition to the Council, and

WHEREAS, The petition hereinbefore referred to was duly presented to said Council on said date, to wit, September 13, 1922, which said petition duly set forth a description of said portion of said street sought to be vacated and the reasons for such vacation and the purpose for which the ground is proposed to be used and said petition was duly signed by School District No. 1, Multnomah County, Oregon, and

WHEREAS, there was appended to said petition as a part thereof and as a basis for such vacation and as a basis for the granting of the prayer of said petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said street proposed to be vacated, estimated upon the frontage of said portion of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, which consent is in writing and duly acknowledged before an officer authorized to take acknowledgments and is attached to said petition and filed therewith with the Auditor of said City, and

WHEREAS, the Council, upon the presentation

of said petition and the filing of proof of publication of said notice, did fix a meeting of said council to be held on the 15th day of September, 1922, at 2 o'clock P. M. as the time for hearing said petition and any objections that might be filed thereto, and

WHEREAS, at said time so fixed for such hearing said petition was duly presented, heard and considered by the Council, and the Council continued such hearing to 8 o'clock P. M. on said 15th day of September, 1922, to which time the Council adjourned, and at said time, to wit, 8 o'clock P. M. on said 15th day of September, 1922, the Council further heard and considered said petition and objections thereto, and the Council did find, ascertain and determine and does now hereby find, ascertain and determine that all of the foregoing recited [36] facts are true, and that all the acts and things above recited have been duly done and performed as required by the charter and ordinances of said city, and that the consent of the owners in fee simple has been given of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated estimated upon the frontage of said street, such frontage being as hereinbefore particularly set out, which consent is in writing, duly acknowledged before an officer authorized to take acknowledgments and was and is attached to and filed with said petition; that the public interest will not be prejudiced by the vacation of said portion of said street and that the objections and remonstrances filed against such petition should be denied and are overruled, and

WHEREAS, the Council did on said date, to wit, September 15, 1922, grant the prayer of said petition in its entirety, now, therefore,

The City of Portland does ordain as follows:

Section 1. The findings and actions hereinbefore recited are hereby made a matter of record and the Council of the City of Portland does hereby find and determine that all of the facts, matters and things hereinbefore recited are true, and that all of the acts and things above recited have been duly done and performed as hereinbefore set forth and as required by the charter and ordinances of said City of Portland. The Council further finds and determines that the consent of the owners of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated, estimated upon the frontage of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof, has been obtained, which consent of owners is in writing and duly acknowledged before an officer authorized to take acknowledgments and is and was attached to said petition and filed therewith with the Auditor of said City of Portland. The Council further finds and determines that the public interest will not be prejudiced by the vacation of said portion of said street, and each and all of the objections and remonstrances filed or made against said proposed vacation are hereby

denied and overruled, and said petition is hereby granted.

Section 2. All that portion of East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street, in the City of Portland, Multnomah County, Oregon, be and the same is hereby vacated, and the said vacation of said portion of said street is hereby made a matter of record. Said petitioner shall, within ten days after the taking effect of this ordinance, pay into the city treasury the cost of obtaining the necessary changes on the public records so as to indicate as required by the law such vacation.

Passed by the Council.

Approved: _____,

Mayor of the City of Portland.

Attest: _____,

Auditor of the City of Portland. [37]

Exhibit "F."

ORDINANCE No. —.

An Ordinance vacating that portion of Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street.

WHEREAS, due notice has been given by advertisement thereof for four weeks, to wit, from August 10, 1922, to September 7, 1922, both dates inclusive, in the Daily Record-Abstract, the City Official Newspaper, published in the City of Portland, Multnomah County, State of Oregon, that at a regular meeting of the Council of said City to be held on the 13th day of September, 1922, a petition

would be presented to said Council praying for the vacation of that portion of Clackamas Street lying between the west line of East 9th Street and the east line of East 7th Street, in the City of Portland, Multnomah County, State of Oregon, which said notice, together with due proof of publication thereof was filed in the office of the Auditor of said City of Portland on September 12, 1922, prior to the presentation of said petition to the Council, and

WHEREAS, the petition hereinbefore referred to was duly presented to said Council on said date, to wit, September 13, 1922, which said petition duly set forth a description of said portion of said street sought to be vacated and the reasons for such vacation and the purpose for which the ground is proposed to be used and said petition was duly signed by Scholl District No. 1, Multnomah County, Oregon, and

WHEREAS, there was appended to said petition as a part thereof and as a basis for such vacation and as a basis for the granting of the prayer of said petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said street proposed to be vacated, estimated upon the frontage of said portion of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, which consent is in writing and duly acknowledged before an officer

authorized to take acknowledgments and is attached to said petition and filed therewith with the Auditor of said City, and

WHEREAS, the Council, upon the presentation of said petition and the filing of proof of publication of said notice, did fix a meeting of said Council to be held on the 15th day of September, 1922, at 2 o'clock P. M. as the time for hearing said petition and any objections that might be filed thereto, and

WHEREAS, at said time so fixed for such hearing said petition was duly presented, heard and considered by the Council, and the Council continued such hearing to 8 o'clock P. M. on said 15th day of September, 1922, to which time the Council adjourned, and at said time, to wit, 8 o'clock P. M. on said 15th day of September, 1922, the Council further heard and considered said petition and objections thereto, and the Council did find, ascertain and determine and does now hereby find, ascertain and determine that all of the foregoing recited facts are true, and that all the acts and things above recited have been duly done and performed as required by the charter and ordinances of said city, and that the consent of [38] the owners in fee simple has been given of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated estimated upon the frontage of said street, such frontage being as hereinbefore particularly set out, which consent is in writing, duly acknowledged before an officer authorized to take acknowledgments and was and is attached to and filed with said petition; that the

public interest will not be prejudiced by the vacation of said portion of said street and that the objections and remonstrances filed against such petition should be denied and overruled, and

WHEREAS, the Council did on said date, to wit, September 15, 1922, grant the prayer of said petition in its entirety, now, therefore,

The City of Portland does ordain as follows:

Section 1. The findings and actions hereinbefore recited are hereby made a matter of record and the Council of the City of Portland does hereby find and determine that all of the facts, matters and things hereinbefore recited are true, and that all of the acts and things above recited have been duly done and performed as hereinbefore set forth and as required by the charter and ordinances of said City of Portland. The Council further finds and determines that the consent of the owners of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated, estimated upon the frontage of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof, has been obtained, which consent of owners is in writing and duly acknowledged before an officer authorized to take acknowledgments and is and was attached to said petition and filed therewith with the Auditor of said City of Portland. The Council further finds and determines that the public

interest will not be prejudiced by the vacation of said portion of said street, and each and all of the objections and remonstrances filed or made against said proposed vacation are hereby denied and overruled, and said petition is hereby granted.

Section 2. All that portion of Clackamas Street which lies between the west line of east 9th Street and the east line of East 7th Street, in the City of Portland, Multnomah County, State of Oregon, be and the same is hereby vacated, and the said vacation of said portion of said street is hereby made a matter of record. Said petitioner shall, within ten days after the taking effect of this ordinance, pay into the city treasury the cost of obtaining the necessary changes on the public records so as to indicate as required by law such vacation.

Passed by the Council.

Approved: _____,

Mayor of the City of Portland.

Attest: _____,

Auditor of the City of Portland.

6502. Ordinance No. ——. An ordinance vacating that portion of Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street. Sept. 15, 1922. Read 1 and 2 and up for 3d reading Sept. 27, '22.

Stamped on this "By order of Council."

Bill of Complaint. Filed September 23, 1922, at 10:35 A. M. G. H. Marsh, Clerk. [39]

AND AFTERWARDS, to wit, on the 23d day of September, 1922, there was issued out of said court, a subpoena ad respondendum, which with the marshal's return of service on the Oregon Real Estate Company, is in words and figures, as follows, to wit: [40]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad. resp. together with copy of complaint and order to show cause on the therein named Oregon Real Estate Co., by handing to and leaving a true and correct copy thereof with H. S. Reed, Secy., personally at Portland, in said District on the 23d day of September, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Lee Morelock,

Deputy. [41]

(Title of the Court and Cause.)

Subpoena Ad Respondendum.

The President of the United States of America,
To the City of Portland, a Municipal Corporation, George L. Baker, Mayor Thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah

County, Oregon, Including the City of Portland, a Body Politic and Corporation, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of said School District No. 1; also Oregon Real Estate Company, a Corporation, GREETING:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the courtroom thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein J. B. C. Lockwood is complainant and you are defendants, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or your Deputy, to make due service of this our writ of subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

WITNESS the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23d day of September, 1922.

[Seal]

G. H. MARSH,
Clerk.

By F. L. Buck,
Chief Deputy Clerk.

MEMORANDUM, Pursuant to Equity Rule No. 12
of the Supreme Court of the United States.

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*.

Returned and filed September 26, 1922. G. H. Marsh, Clerk. [42]

AND AFTERWARDS, to wit, on Saturday, the 23d day of September, 1922, the same being the 71st judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [43]

(Title of Court and Cause.)

Order to Show Cause.

In the above-entitled court and cause, the verified complaint treated as an affidavit upon which to base the application for temporary restraining order and injunction, having been presented to and considered by the Court, and it appearing that an emergency exists and that good cause exists for an early hearing of plaintiff's application for temporary restraining order in the above court and cause—

IT IS NOW ORDERED that the defendants and each of them are required to be and appear in the above court and cause on Tuesday, September 26, 1922, at the hour of 10 o'clock A. M. thereof, then

and there to show cause why an injunction *pendente lite* should not issue in the above cause.

September 23, 1922.

R. S. BEAN,
Judge.

Filed September 23, 1922. G. H. Marsh, Clerk.
[44]

AND AFTERWARDS, to wit, on the 26th day of September, 1922, there was duly filed in said court a motion of the defendants City of Portland et al. to dismiss the bill of complaint, in words and figures as follows, to wit: [45]

(Title of Court and Cause.)

Motion of City of Portland et al. to Dismiss Bill of Complaint.

Come now the defendants, The City of Portland, George L. Baker, Mayor, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, and George R. Funk, Auditor, of said City of Portland, and move that the bill of complaint herein and this suit be dismissed upon the following grounds:

1. That it appears upon the face of the complaint herein that the plaintiff is not entitled to the relief prayed for nor to any relief.

2. That it appears upon the face of the said complaint that the plaintiff has not sufficient interest in the subject matter of this suit to entitle him to the relief prayed for or [46] to any relief, in that it does not appear that the plaintiff will suffer any special or peculiar inconvenience or damage, or any

inconvenience or damage peculiar to him and not experienced by the public at large, by any closing of the streets mentioned in the complaint if such streets should be closed as a result of the passage of ordinances, copies of which are attached to the complaint.

3. That it appears upon the face of the complaint that the passage of ordinances, copies of which are attached to the complaint, is within the scope of the charter powers of the City of Portland, and within the scope of the powers duly delegated to said city under the Constitution and Laws of the State of Oregon, and that equity will not enjoin the passage of such ordinances.

4. That said complaint is deficient in that it is indefinite and uncertain and does not state the situation of plaintiff's property with reference to the parts of streets proposed to be vacated.

5. That the complaint does not set forth facts sufficient to give this court jurisdiction in this cause in that it fails to set forth the amount involved in litigation except by a conclusion of law.

6. That in vacating a street or part thereof the City of Portland acts judicially, and after a hearing, and such act is reviewable in the State courts in the ordinary course of law. This court, therefore, has no jurisdiction to entertain this suit.

FRANK S. GRANT,

H. M. TOMLINSON,

Attorneys for Defendants, The City of Portland,
George L. Baker, John M. Mann, C. A. Bigelow,
S. C. Pier, A. L. Barbur and George R. Funk.

Filed September 26, 1922. G. H. Marsh, Clerk.

[47]

AND AFTERWARDS, to wit, on the 26th day of September, 1922, there was duly filed in said court, a motion of School District No. 1, Multnomah County, Oregon, et al. to dismiss the bill of complaint, in words and figures as follows, to wit: [48]

(Title of Court and Cause.)

Motion of School District No. 1, Multnomah County, Oregon, et al. to Dismiss Bill of Complaint.

Come now School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon, and move the Honorable Court for an order dismissing the within suit on the ground and for the reason that the facts alleged in the complaint on file herein do not constitute a cause of suit against the above-named defendants or any of them.

STANLEY MYERS,

District Attorney,

SAM'L H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark,

George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

To the Plaintiff and His Attorney:

You will please take NOTICE that in the argument of the [49] above motion the within named defendants will contend that no facts are shown which entitle the plaintiff to bring this suit for the abatement of an alleged public nuisance, it not being made to appear that he will sustain damage differing in kind from that suffered by the general public; also that the defendants herein are not proper parties to a suit for an injunction, it appearing from the facts stated that they do not contemplate any action for closing the streets enumerated except upon the sanction of the local authorities.

STANLEY MYERS,

District Attorney,

SAM'L H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

Filed September 26, 1922. G. H. Marsh, Clerk.
[50]

AND AFTERWARDS, to wit, on Wednesday, the 27th day of September, 1922, the same being the 77th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [51]

(Title of Court and Cause.)

Order Denying Petition for Temporary Restraining Order and Injunction.

This cause was heard by the Court on the petition of plaintiff for a temporary restraining order herein, and upon the motions to dismiss of the City of Portland et al. and of School District No. 1, Multnomah County, Oregon, et al., and was argued by Mr. Isham N. Smith, of counsel for plaintiff, and by Mr. H. M. Tomlinson, of counsel for the City of Portland et al., and by Mr. Samuel H. Pierce, of counsel for School District No. 1, Multnomah County, Oregon, et al.

Upon consideration whereof, IT IS ORDERED that said petition for a temporary restraining order and injunction herein be, and the same is hereby, denied; and

IT IS FURTHER ORDERED that both of said motions to dismiss be, and the same is hereby, denied. [52]

AND AFTERWARDS, to wit, on the 19th day of October, 1922, there was duly filed in said court an amendment to the bill of complaint, which, with proof of service on the defendant Oregon Real Estate Company, in words and figures as follows, to wit: [53]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed amendment to complaint on the therein-named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with H. S. Reed, Secretary, personally, at Portland, in said District, on the 17th day of October, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Frank Snow,

Deputy. [54]

(Title of Court and Cause.)

Amendment to Bill of Complaint.

Plaintiff, by leave of Court first had and obtained, files this his amendment to his complaint, and alleges:

I.

That plaintiff attaches hereto as Exhibit "G" a true copy of the deed from defendant Oregon Real Estate Company to this plaintiff heretofore referred

to, and prays that said deed be read as a part hereof.

II.

That Holladay Addition was platted and dedicated, and the streets and thoroughfares and parks therein were platted and dedicated, in accordance with and as a part of a general plan to make said Holladay Addition desirable for and as a residential section of the former City of East Portland, and that when such former municipality was consolidated with the [55] City of Portland in 1891 such plan then existed and was well known, and the defendant Oregon Real Estate Company had inserted in every deed of conveyance of residence property executed by it prior to the execution of the deed to this plaintiff restrictive covenants of use and sale of similar import to those contained in this plaintiff's deed. That the Oregon Real Estate Company has sold numerous lots and tracts of land in said Holladay Addition as per said recorded plat and has made said recorded plat by reference a part of each deed of conveyance affecting property in said addition conveyed by it.

III.

At the time of the purchase of plaintiff's property as shown in his deed marked Exhibit "G" the said streets affected by the proceedings herein complained of were then, and hence hitherto each of said streets have been and now are appropriate and useful adjunct to the lands of plaintiff and form part of the means of ingress and egress to and from said lands. That after plaintiff purchased his said

lots, all the streets and thoroughfares in Holladay's Addition were hard surfaced and improved, and such improvements were made at the expense of the property owners within said district, and this plaintiff has paid for street improvements of the property so bought by him approximately the sum of \$1,978.60 with interest. That since the improvement of said streets each and both thereof throughout their length have been and now are in fine state of repair, and have been constantly used and are now used, and each and both of said streets furnishes, and is a convenient use and way of ingress and egress to and from and throughout Holladay Addition, and the connecting street with said City of Portland.

At the time this plaintiff purchased his said lots he was led to believe, and did believe, that said lots were in the midst of the restricted district and the use of his lots was restricted as per his said deed. That this plaintiff, upon the belief that the streets and ways shown on said plat were public ways and would remain as such, as well as depending upon the restriction contained in his deed, and believing that his property was located within a restricted residence district, constructed a dwelling-house on part of his said property and otherwise improved said property at the cost of many thousands of dollars, all of which was known to and is now known to defendants herein, or which by reasonable inquiry could be learned by defendants and each of them.

That the existence of the streets and thoroughfares shown in said plat and of the restrictions for the use of the property as above recited, gave an added value to plaintiff's lots and entered into and formed a part of the consideration of the purchase of his said property.

IV.

That the defendant School District intends to use the property which it acquires under its contract from the Oregon Real Estate Company, referred to in the complaint and the supplemental [56] complaint, for purposes other than residential purposes, to wit, for the purposes of maintaining and erecting public school buildings, playgrounds and structures for public school purposes upon, across and over said blocks 95, 97 and 98, and the vacated portions of each of said streets, and thereby perpetually and forever to devote said premises and every part thereof to purposes other than residential purposes, and that the erection of such school buildings and the use of said premises for school purposes and school playground purposes will deprive this plaintiff of the right to have said property, to wit, all of Blocks 95, 97 and 98, devoted solely to residential purposes as hereinbefore set forth, and of his right to have the portions of said vacated streets used for street purposes.

V.

That the existence of the proposed public school and the public school playgrounds as heretofore alleged and the devotion of said blocks, and the vacated portions of said streets, to public school

purposes instead of residential purposes will greatly depreciate and injure the value of this plaintiff's property, and will impair its desirability for residence purposes, and that the injury thereby inflicted upon plaintiff and his said property is different in kind from that suffered by the general public and is peculiar to plaintiff and his said property and to those similarly situated with plaintiff alone.

VI.

That neither of said ordinances attached to the complaint marked Exhibits "E" and "F" provides for any means or method of ascertaining plaintiff's damages nor any means or [57] method of paying plaintiff for such damages, and that each and both of said ordinances attempt to take plaintiff's property and his property rights without compensation and to devote plaintiff's property rights and rights of easement to the private use of Oregon Real Estate Company for sale without compensating the plaintiff in any manner therefor.

VII.

That the defendants and each of them knows and has means of knowledge, by means of reference to plaintiff's recorded deed of the covenants and restrictions inserted therein, and by reference to the recorded plat each of said defendants has knowledge and means of knowledge of the existence of the streets and thoroughfares in Holladay's Addition as shown thereon and of each fact shown by said recorded plat.

VIII.

That defendant Oregon Real Estate Company, in

signing the consent of property owners to the vacation of each portion of each of such streets, and in entering into a contract for the sale of said Blocks 95, 97 and 98, Holladay's Addition aforesaid, and the vacated portions of each of said streets, and in consenting to the use of said Blocks 95, 97 and 98, Holladay Addition aforesaid, as well as the vacated portions of each of said streets, for school purposes, has committed a fraud and a wrong upon this plaintiff and his said property, which is remediless at law, and that the actions of the defendants School District and Oregon Real Estate Company in changing and diverting from residential purposes to school purposes the property within Blocks 95, 97 and 98, Holladay's Addition aforesaid, and in changing the vacated portions of said streets to school grounds, are a fraud and a wrong upon [58] this plaintiff's contractual and vested rights, and a breach of the covenants and warranties set forth in plaintiff's deed and of the conditions and the particulars appearing on the plat of dedication attached to the complaint as Exhibit "A."

IX.

That the damages so inflicted upon the estate of this plaintiff as above alleged are remediless at law and that the injuries complained of will result in great and irreparable injury and damage to this plaintiff and his estate which cannot be adequately compensated at law.

X.

That at the time of the making of the original plat and dedication of Holladay's Addition to the

shall revert to the grantor herein, its successors and assigns.

Second—During the period of twenty years from the date hereof the herein granted premises shall not be occupied by any shop, store, livery stable, foundry or other places of business, nor used for the carrying on of any trade, or business, whatever, but shall, when in use, be used solely for residence purposes, nor shall the said premises be used or occupied at any time by Chinese, and if either of these conditions be broken by the grantee herein his assigns or legal representatives, this deed shall become null and void, and the title to the herein granted premises shall revert to the grantor herein, its successors and assigns.

TO HAVE AND TO HOLD, the above described and granted premises, subject to the conditions herein contained, unto the said J. B. C. Lockwood his heirs and assigns forever. And the said OREGON REAL ESTATE COMPANY the grantor above named, does covenant to and with J. B. C. Lockwood the above named grantee his heirs and assigns, that the above granted premises are free from all incumbrances, and that it will warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, the grantor above named, has hereunto [61] set its seal this sixth day of April, A. D. 1908.

THE OREGON REAL ESTATE COMPANY,

By C. X. LARRABEE,

President.

THE OREGON REAL ESTATE COMPANY,

[Corporate Seal] By MARTIN D. WHITE,

Secretary.

Executed in the presence of

LOUIS KING.

SAM J. BESWICK.

State of Oregon,

County of Multnomah,—ss.

BE IT REMEMBERED, that on this sixth day of April, A. D. 1908, before me, the undersigned, a Notary Public in and for the said County of Multnomah, and State of Oregon, duly commissioned and qualified, personally came C. X. Larrabee, president of the Oregon Real Estate Company, and Martin D. White, Secretary of the Oregon Real Estate Company, whose names are subscribed to the foregoing instrument as parties thereto, and as such President and such Secretary of said Oregon Real Estate Company, both personally known to me to be the individuals named and described in, and who executed the said instrument, and they severally acknowledged to me that he, the said C. X. Larrabee as such President, and he, the said Martin D. White as such Secretary of the Oregon Real Estate Company, executed the foregoing instrument as and for the act and deed of

said Oregon Real Estate Company, freely and voluntarily, and for the uses and purposes therein mentioned; and he, the said Martin D. White being by me duly sworn, did depose and say that he is the Secretary of the Oregon Real Estate Company, and resides at Portland, Multnomah County, Oregon; that he is the legal custodian of, and is acquainted with, and has in his possession the Corporate Seal of the Oregon Real Estate Company; that the seal affixed to the foregoing instrument is such Corporate Seal; that the same was so affixed by him as such Secretary of said Company on the sixth day of April, A. D. 1908, by order of the Board of Directors of said Company, and that he signed his name thereto by like order of the Board of Directors of said Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at the City of Portland, Oregon, the date first above written.

[Notarial Seal]

SAM J. BESWICK,

Notary Public for Oregon.

Rec. for record April 6, 1908, at 3:39 P. M.

Recorded in Record of Deeds 417, page 332.

Service admitted Portland, Oregon, Oct. 17, 1922.

H. M. TOMLINSON,

Attorney for City of Portland and Commissioners,

S. H. PIERCE,

Attorney for Defendant School District and Its Directors.

Filed October 19, 1922. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 19th day of October, 1922, there was duly filed in said court a supplemental bill of complaint, with proof of service on defendant Oregon Real Estate Company, *is* in words and figures as follows, to wit: [63]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify that I served the annexed supplemental complaint on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with H. S. Reed, Secretary, personally, at Portland, in said District, on the 17th day of October, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Frank Snow,

Deputy. [64]

(Title of Court and Cause.)

Supplemental Bill of Complaint.

Plaintiff, by leave of Court first had and obtained, files this his supplemental bill of complaint and alleges:

I.

That since the institution of this suit and on, to wit, the 27th day of September, 1922, the defendants the City of Portland, acting through its mayor, George L. Baker, and its commissioners, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier,

has passed the ordinances copies of which are attached to the complaint as Exhibits "E" and "F," and said ordinances so passed have been duly signed by the mayor, attested by the defendant Funk, city auditor, and have been filed and are preserved, and the record thereof has been made in a book kept for that purpose marked "Ordinance Record" of the City of Portland. [65]

That by the provisions of Section 48 of the Charter of the City of Portland in effect July 1, 1913, as revised by the council August 19, 1914, it is provided:

"Ordinances (a) making appropriations and the annual tax levy, (b) relative to local improvements and assessments therefor, and (c) emergency ordinances, shall take effect immediately upon their passage. All other ordinances enacted by the Council shall take effect thirty days after their passage, unless a later date is fixed therein, in which event they shall take effect at such later date, subject to the referendum and subject to the provisions of Section 52 of this Charter."

II.

This plaintiff is informed and believes, from statements made by the defendant William F. Woodward, acting on behalf of the defendant School District and on behalf of the other directors of said School District who are defendants herein, that the defendant School District and the defendant Oregon Real Estate Company have entered a contract for the purchase by said School District

from said Oregon Real Estate Company of Blocks 95, 97 and 98, Holladay's Addition to Portland, Oregon, aforesaid, together with those portions of the streets affected by said ordinances which upon vacation of said streets would revert to said Oregon Real Estate Company as owner of the abutting property; and plaintiff further alleges that the defendant School District has entered into and taken possession of some or all of said blocks 95, 97 and 98 under its contract of purchase.

III.

That the defendant School District and Oregon Real Estate Company intend to, and will unless restrained by order of this Court as heretofore sought, from and after the effective date of said ordinance take possession of the vacated portions of the streets described in Exhibits "E" and "F" attached [66] to the complaint, and will tear up and destroy the improvements thereon, and will convert and are now taking steps to convert the vacated portions of each of said streets to the use and benefit of the defendants Oregon Real Estate Company and the School District, and that the defendant City of Portland and its mayor and commissioners threaten to, and unless restrained by order of this Court will, permit said defendants School District and Oregon Real Estate Company so to take possession of the vacated portions of the streets described in Exhibits "E" and "F" and to destroy the improvements thereon, and to appropriate and adopt said vacated portions of each of said streets to the sole and separate use of the

defendants School District and Oregon Real Estate Company, and said defendants acting together threaten to, and unless restrained by this Court will, exclude the general public from the use of such vacated portions of said streets and each of them as streets, highways and thoroughfares, and threaten to and will, unless restrained by order of this Court, deprive this plaintiff and others similarly situated with plaintiff of their private rights, easements and rights of way over, along, across and through such vacated portions of said streets and each of them, and thereby the defendants acting together threaten to and will, unless restrained by order of this Court, deprive this plaintiff and others similarly situated with plaintiff of his rights of ingress and egress over, along, across and upon the vacated portions of each of said streets, and will destroy his private rights of way along, across and over such vacated portions of each of said streets, and will deprive him of his property and easements therein and thereover without due or any process of law. [67]

IV.

That neither or any of said defendants has ever offered to this plaintiff or has made provision to pay to this plaintiff any compensation or renumeration for the destruction of his rights of easement and rights of way and of ingress and egress over, along, upon and across the vacated portions of said streets, or either of them, and that the defendants acting together are threatening to and will, unless restrained by order of this Court, appro-

priate and take over this plaintiff's said easement and rights of way along, across, over, and upon the vacated portions of said streets and each of them, without compensation.

V.

That by the vacation of those portions of each of said streets affected by this proceeding, the property of this plaintiff, which he so purchased from the defendant Oregon Real Estate Company as above alleged, will be greatly depreciated in value by the proposed vacation and occupation of those portions of said streets and each of them as heretofore shown, and that the injury and damage to these plaintiffs or his property rights is of a special or peculiar kind and is not such damage or injury as the general public may suffer by the vacation of said streets.

VI.

That the defendant School District threaten to use all of the vacated portion of said streets for school purposes and to erect and construct and maintain on the property acquired by it from the defendant Oregon Real Estate Company a public school building or buildings and playgrounds, and by the maintenance of such public school building and playgrounds and the devotion of said property so acquired by said School District from the Oregon Real Estate Company, the property [68] of this plaintiff heretofore described herein will be greatly depreciated in its value, in its marketability, and in its salability, to plaintiff's damage, and the damage so inflicted upon plaintiff's property

is peculiar and personal to himself and his property, and it is a damage of a different kind to that suffered by the general public by the erection and construction of said school buildings and by the appropriation of said property for schoolhouse purposes and school playground purposes as aforesaid.

VI.

That this plaintiff has acquired easement, rights of way and of ingress and egress to, over and across each portion of each street so vacated as herein alleged, and is entitled to have each of said portions of said streets kept open and used only as a street, and that defendant Oregon Real Estate Company and defendant School District and each of them are and ought to be estopped from diverting said portions of each of said streets, or any part thereof from street purposes and from appropriating, devoting or using the vacated portions of each of such streets to any other use than street purposes.

VIII.

That said ordinances so passed by the defendant City of Portland acting through its mayor and council as aforesaid are, and each of them is, void in this:

(a) That neither of said ordinances purports to create or provide any fund whatsoever or to provide a way or means for raising funds to compensate this plaintiff for any damages which he suffers as above alleged, or for any part of said damages;

(b) That each of said ordinances attempts to vacate the respective portions of the streets referred to therein [69] without in any manner providing for any means or method of determining the damages which this plaintiff will suffer by reason thereof, and the defendants School District and Oregon Real Estate Company are threatening to and will, unless restrained by this Court, appropriate said vacated portions of each of said streets to their own use without compensating this plaintiff in any manner for his damages occasioned thereby;

(c) That each of said ordinances is further void by reason of the facts specified in the original complaint herein.

WHEREFORE plaintiff, J. B. C. Lockwood, prays that the relief asked in his original complaint be granted, and for general relief, and especially for the following relief:

First. For a mandatory injunction against the City of Portland restraining it from vacating and abandoning said portions of said streets, and compelling it to restore said streets to public streets, and more especially as easements and rights of way which this plaintiff has acquired under his deed aforesaid;

Second. That the defendants School District and Oregon Real Estate Company and each of them be enjoined and restrained from using any portion of the streets so vacated for other than street purposes;

Third. That each and all of said defendants be restrained and enjoined from using any or either of the vacated portions of each and both of said streets for any purpose inconsistent with the continuous use thereof as an open public street;

Fourth. That plaintiff recover his costs.

ISHAM N. SMITH,
Attorney for Plaintiff.

(Duly verified by counsel for plaintiff.) [70]

Service admitted, Portland, Ore., Oct. 17, 1922.

H. M. TOMLINSON,
Attorney for City of Portland and Its Mayor and
Commissioners.

S. H. PIERCE,
Attorney for Defendant School District and Its
Directors.

Filed October 19, 1922. G. H. Marsh, Clerk.
[71]

AND AFTERWARDS, to wit, on the 23d day of October, 1922, there was duly filed in said court a motion of the defendant City of Portland et al. to dismiss the amendment to bill of complaint and the supplemental bill of complaint, in words and figures as follows, to wit: [72]

(Title of Court and Cause.)

**Motion of City of Portland et al. to Dismiss
Amendment to Bill of Complaint and Supple-
mental Bill of Complaint.**

Come now the defendants, The City of Portland,
George L. Baker, Mayor, A. L. Barbur, Commis-

sioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, and George R. Funk, Auditor, of said City of Portland, and move that the complaint, amendment to complaint, and supplemental complaint herein, be dismissed as to these defendants, upon the following grounds:

1. That it appears upon the face thereof that the plaintiff is not entitled to the relief prayed for nor to any relief.

2. That it appears upon the face thereof that the plaintiff has not sufficient interest in the subject matter [73] of this suit to entitle him to the relief prayed for or to any relief, in that it does not appear that the plaintiff will suffer any special or peculiar inconvenience or damage, or any inconvenience or damage peculiar to him and not experienced by the public at large, by any closing of the streets mentioned in the complaint if such streets should be closed.

3. That it appears upon the face of said supplemental complaint that the act of passing the ordinances attached to the complaint and marked, respectively, "E" and "F," which act plaintiff seeks to enjoin, has already been performed and accomplished.

4. That it appears upon the face of said complaint, amendment to complaint, and supplemental complaint, that the passage of said ordinances is within the scope of lawful power of the City of Portland and the Council of said city.

5. That the complaint does not set forth facts

sufficient to give this court jurisdiction in this cause in that it fails to set forth the amount involved in litigation except by a conclusion of law.

6. That in passing said ordinance to vacate said parts of streets the council of the City of Portland acted judicially, and after a hearing, and said act is reviewable in the state courts in the ordinary course of law. This Court, therefore, is without jurisdiction to entertain this suit.

FRANK S. GRANT,

H. M. TOMLINSON,

Attorneys for Defendants, The City of Portland,
George L. Baker, Mayor, A. L. Barbur, Commissioner, John M. Mann, Commissioner, S. C. Pier, Commissioner, George R. Funk, Auditor,
of said City of Portland.

Filed October 23, 1922. G. H. Marsh, Clerk.
[74]

AND AFTERWARDS, to wit, on the 23d day of October, 1922, there was duly filed in said court a motion of defendant School District No. 1, Multnomah County, Oregon, et al., to dismiss amendment to bill of complaint and supplemental bill of complaint, in words and figures as follows, to wit: [75]

(Title of Court and Cause.)

Motion of School District No. 1, Multnomah County, Oregon, et al. to Dismiss Amendment to Bill of Complaint and Supplemental Bill of Complaint.

Come now School District No. 1, Multnomah

County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, directors of School District No. 1, Multnomah County, Oregon, and move the Honorable Court for an order dismissing the within suit on the grounds and for the reason that the facts alleged in the complaint, amendments to the complaint and supplemental complaint on file herein do not constitute a cause of suit against the above-named defendants or any of them.

STANLEY MYERS,

District Attorney.

SAML. H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

To the Plaintiff and to His Attorney:

You will please take NOTICE that in the argument of the above motion the within named defendants will contend that no facts are alleged which entitle the plaintiff to the relief prayed for, in the following particulars, to wit:

1. That no facts are alleged showing that the amount involved in this controversy exceeds \$3,000, exclusive of interest and costs, and therefore that this court has no jurisdiction to hear and determine this suit. [76]

2. That the allegations to the effect that the plaintiff has individual rights in the streets to be closed are immaterial, irrelevant and incompetent for the reason that the said individual rights, if any, were acquired subject to the paramount right of the state and of the City of Portland to vacate said streets and close them to public travel; that the allegations to the effect that said School District No. 1 acquired said property subject to certain restrictions as to its use are irrelevant, immaterial and incompetent, in view of the fact that no remedy is demanded in connection therewith.

3. That there is no allegation that the ordinances heretofore enacted by the City of Portland are in any manner irregular or illegal or that the defendants therein are proceeding to act upon an illegal or a void ordinance in obstructing said streets.

STANLEY MYERS,

District Attorney.

SAM'L H. PIERCE,

Deputy District Attorney.

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

Filed October 23, 1922. G. H. Marsh, Clerk
[77]

AND AFTERWARDS, to wit, on Monday, the 13th day of November, 1922, the same being the 7th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [78]

(Title of Court and Cause.)

Order Sustaining Motions to Dismiss Amendment to Bill of Complaint and Supplemental Bill of Complaint.

This cause was heard by the Court upon the respective motions of the City of Portland et al. and of School District No. 1, Multnomah County, Oregon, et al. to dismiss the complaint, amendment to the complaint and supplemental complaint herein, and was argued by Mr. I. N. Smith, of counsel for plaintiff, and by Mr. H. M. Tomlinson and Mr. Samuel A. Pierce, of counsel. And the Court being fully advised in the premises, upon consideration thereof—

IT IS ORDERED that said motions be and they are hereby allowed, that said complaint herein be and the same is hereby dismissed, that plaintiff take nothing by this action, and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein taxed in the sum of \$——.

R. S. BEAN,
Judge.

Filed November 13, 1922. G. H. Marsh, Clerk.
[79]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a petition for appeal and allowance of appeal, which with proof of service on defendant Oregon Real Estate Company, is in words and figures as follows, to wit: [80]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed petition for appeal and allowance on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real Estate Company, personally, at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [81]

(Title of Court and Cause.)

Petition for Appeal and Order Allowing Same.

To the Honorable ROBERT S. BEAN, Judge of the
District Court of the United States for the Dis-
trict of Oregon:

The above-named plaintiff, J. B. C. Lockwood, considering himself aggrieved by the decree entered in the above-entitled court on the 13th day of November, 1922, in the above-entitled cause, does hereby appeal from said decree to United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that an appeal be allowed and a citation issue as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, may be sent to the United States *Circuit* [82] *of Appeals* for the Ninth Circuit.

Your petitioner further prays that a proper order touching the security to be required in order to perfect this appeal be made, and upon the filing of said bond said appeal may become effective.

Dated December 2, 1922.

ISHAM N. SMITH,
418 Mohawk Building, Portland, Oregon,
Attorney for Plaintiff.

ORDER.

The foregoing petition is granted, and the appeal is allowed in the above-entitled cause, and it is ordered that an appeal bond herein be fixed at the sum of five hundred dollars (\$500.00).

Dated this 5th day of December, 1922.

R. S. BEAN,
Judge.

Filed December 15, 1922. G. H. Marsh, Clerk.
[83]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court an assignment of errors, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [84]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed assignment of errors on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real Estate Co., personally, at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,
U. S. Marshal.
By A. Davidson,
Deputy. [85]

(Title of Court and Cause.)

Assignment of Errors.

Comes now plaintiff and files the following assignment of errors upon which he will rely upon the prosecution of his appeal from the decree made by this Honorable Court on the 13th day of November, 1922, in the above-entitled court.

The Court erred:

I.

In holding and deciding that the motion to dismiss the above cause on the original complaint, as well as the amendment to the complaint and supplementary complaint, was well taken.

II.

The Court erred in dismissing said cause upon the motion of the defendants, the City of Portland, and its respective officers, George L. Baker, Mayor, A. L. Barbur, John [86] M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor.

III.

The Court erred in dismissing said cause on the motion of the defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, and its directors W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering.

IV.

The Court erred in not overruling said motion

and in refusing to issue the injunction prayed for in said cause, for the following reasons:

(a) The plaintiff J. B. C. Lockwood purchased property as alleged in the complaint according to the recorded plat of Holladay's Addition, Portland, Oregon;

(b) By such purchase he acquired a private easement and right of way over, along, and across all of the streets and thoroughfares designated on said plat;

(c) The defendant the City of Portland and its officers and the defendant School District No. 1 and its officers and defendant Oregon Real Estate Company have conspired together to take from plaintiff his rights of way and easements over and across the designated portions of the streets vacated by this controversy, without compensation, without public necessity, and contrary to law, and in violation of the rights of plaintiff guaranteed by both the state and federal Constitutions as set forth;

(d) This suit to quiet plaintiff's title in and to the designated portions of streets in controversy is his only remedy; no remedy at law is adequate to compensate plaintiff for his [87] estate or his rights of ingress and egress to and over his property described in this complaint, over, along and across the designated portions of the streets in Holladay's Addition, Portland, Oregon, vacated by the proceedings complained of;

(e) By plaintiff's deed he acquired private rights of way over and along said streets and all

of them, and appropriate rights of ingress and egress to and over his property described in the complaint, which is a different property from that of the general public in said streets and highways, and is a private property of the plaintiff, and by the proceedings complained of defendants and each of them have sought to take and by the decree of the Honorable District Court of the State of Oregon they are permitted to take, the private property and the private property rights of this plaintiff in real estate without compensation, without public reason or necessity therefor, and without making provision for the payment to plaintiff of damages which he suffers thereby;

(f) The ordinances of the City of Portland purporting to vacate said streets are, and each of them is, void as to the private right of this plaintiff sought to be enforced by this proceeding.

V.

The Court erred in sustaining the motion of defendants to dismiss said cause and in holding and deciding that the complaint did not state facts sufficient to constitute grounds for remedy in equity, and in holding and deciding that plaintiff's remedy, if any, is at law, and dismissing said bill.

WHEREFORE plaintiff, J. B. C. Lockwood, prays that judgment and decree of said District Court of the United States [88] for the District of Oregon be reversed, and that plaintiff be restored to his rights.

ISHAM N. SMITH,
418 Mohawk Building, Portland, Oregon,
Attorney for Plaintiff.

Filed December 15, 1922. G. H. Marsh, Clerk.
[89]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a bond of appeal, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [90]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed appeal bond on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of Oregon Real Estate Co., at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [91]

(Title of Court and Cause.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, J. B. C. Lockwood, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized under the laws of the State of Oregon to become surety upon bonds,

with its principal office in said State of Oregon at Portland, Oregon, are held and firmly bound unto the above-named defendants, the City of Portland, a municipal corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, [92] W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1, also Oregon Real Estate Company, a corporation, in the sum of five hundred dollars (\$500.00) lawful money of the United States, to be paid to them and to their respective executors, administrators and assigns, jointly and severally, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators and successors, by these presents.

Sealed with our seals and dated this 9th day of December, 1922.

Yet upon this express condition:

That WHEREAS the above-named J. B. C. Lockwood has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the United States District Court for the District of Oregon entered in the above cause on November 13, 1922:

NOW, THEREFORE, the condition of this obligation is such that if the above-named J. B. C. Lockwood shall prosecute his said appeal to effect and answer all costs, damages and disbursements, if he should fail to make good his plea, which may be awarded against him, then this obligation shall be void; otherwise to remain in full force and effect.

Dated December 12, 1922.

J. B. C. LOCKWOOD,
By ISHAM N. SMITH,
His Attorney and Attorney in Fact.
HARTFORD ACCIDENT & INDEMNITY
COMPANY.

By J. T. KERN,
Attorney in Fact.

Approved:

CHAS. E. WOLVERTON,
Judge.

[Seal of Surety Company]

Attest: _____,

Attorney in Fact. [93]

United States of America,
State and District of Oregon,
Multnomah County,—ss.

On this 8th day of December, 1922, before me, the undersigned, Ivy Gay, a notary public in and for the State of Oregon, residing at Portland, Oregon, personally appeared Isham N. Smith, agent and attorney in fact for J. B. C. Lockwood, plaintiff, and J. T. Kern, agents and attorneys in fact for Hartford Accident & Indemnity Company, a corporation, above named, known to me to be the per-

sons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same in behalf of their respective principals and in the capacity therein stated.

Witness my hand and seal at Portland, Oregon, the 9th day of December, 1922.

[Seal]

IVY GAY,

Notary Public for Oregon, Residing at Portland, Multnomah County, therein.

My commission expires February 20, 1926.

Filed December 15, 1922. G. H. Marsh, Clerk.

[94]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a praecipe for transcript, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [95]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed praecipe on the therein named Oregon Real Estate Company by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney for the Oregon Real Estate Co., personally, at Portland, in said District, on the 18th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,
Deputy. [96]

Praeceptum for Transcript of Record.

Honorable George H. Marsh, Clerk of the Above Court:

Please prepare and certify for the appeal of plaintiff herein to the Circuit Court of Appeals of the United States for the Ninth District, copies of the following:

- (1) Plaintiff's original complaint.
- (1½) Original subpoena with proof of service, on Oregon Real Estate Company.
- (2) Motions of the City of Portland, its Commissioners and Auditor to dismiss said complaint.
- (3) Motions by School District No. 1, Multnomah County, Oregon, and its directors to dismiss said complaint.
- (4) Order made on said motion.
- (5) Plaintiff's amendment to his bill of complaint with proof of service.
- (6) Plaintiff's supplementary bill of complaint with proof of service. [97]
- (7) Motions by defendant City of Portland, its Commissioners and Auditor, to dismiss the cause.
- (8) Motions by School District No. 1, Multnomah County, and its directors to dismiss said cause.
- (9) Proof of service of amendment to the complaint and also supplemental complaint upon defendant Oregon Real Estate Company.

- (10) Order of the Court on hearing said motions.
- (11) Copy of judgment of dismissal, or
- (12) Decree of the court.
- (13) Petition for appeal and order allowing appeal, with proof of service.
- (14) Assignments of error, with proof of service.
- (15) Bond and approval thereof, with proof of service.
- (16) Citation, with proof of service.
- (17) This praecipe.
- (18) Certificate of clerk.

ISHAM N. SMITH,
Attorney for Plaintiff.

Service accepted December 18, 1922.

H. M. TOMLINSON,
Of Attorneys for the City of Portland, Its Mayor,
Commissioners and Officers.

STANLEY MYERS,
District Attorney for Multnomah County,
Attorney for School District No. 1, Multnomah
County, Oregon, Its Board of Directors, etc.

Filed December 15, 1922. G. H. Marsh, Clerk.
[98]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of
the United States for the District of Oregon, do

hereby certify that the foregoing pages numbered from 5 to 98, inclusive, constitute the transcript of record on appeal from the final decree in the said court in the case of J. B. C. Lockwood, Plaintiff and Appellant, vs. The City of Portland, a Municipal Corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1; also Oregon Real Estate Company, a Corporation, Defendants and Appellees; that I have prepared the foregoing transcript in accordance with the praecipe for transcript filed by the said appellant and that the same is a full, true, and correct transcript of the record and proceedings had in said court in said cause which the said praecipe directed to be included therein as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit the original citation in said cause with the said transcript of record annexed thereto.

I further certify that the cost of the foregoing transcript is \$23.05, and that the same has been paid by the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the said court to be affixed at Portland, in said District, this 22d day of December, 1922.

[Seal]

G. H. MARSH,

Clerk United States District Court, for the District of Oregon.

[Endorsed]: No. 3962. United States Circuit Court of Appeals for the Ninth Circuit. J. B. C. Lockwood, Appellant, vs. The City of Portland, a Municipal Corporation, George L. Baker, Mayor Thereof, and A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor Thereof, also School District No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of Said School District No. 1, and Oregon Real Estate Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

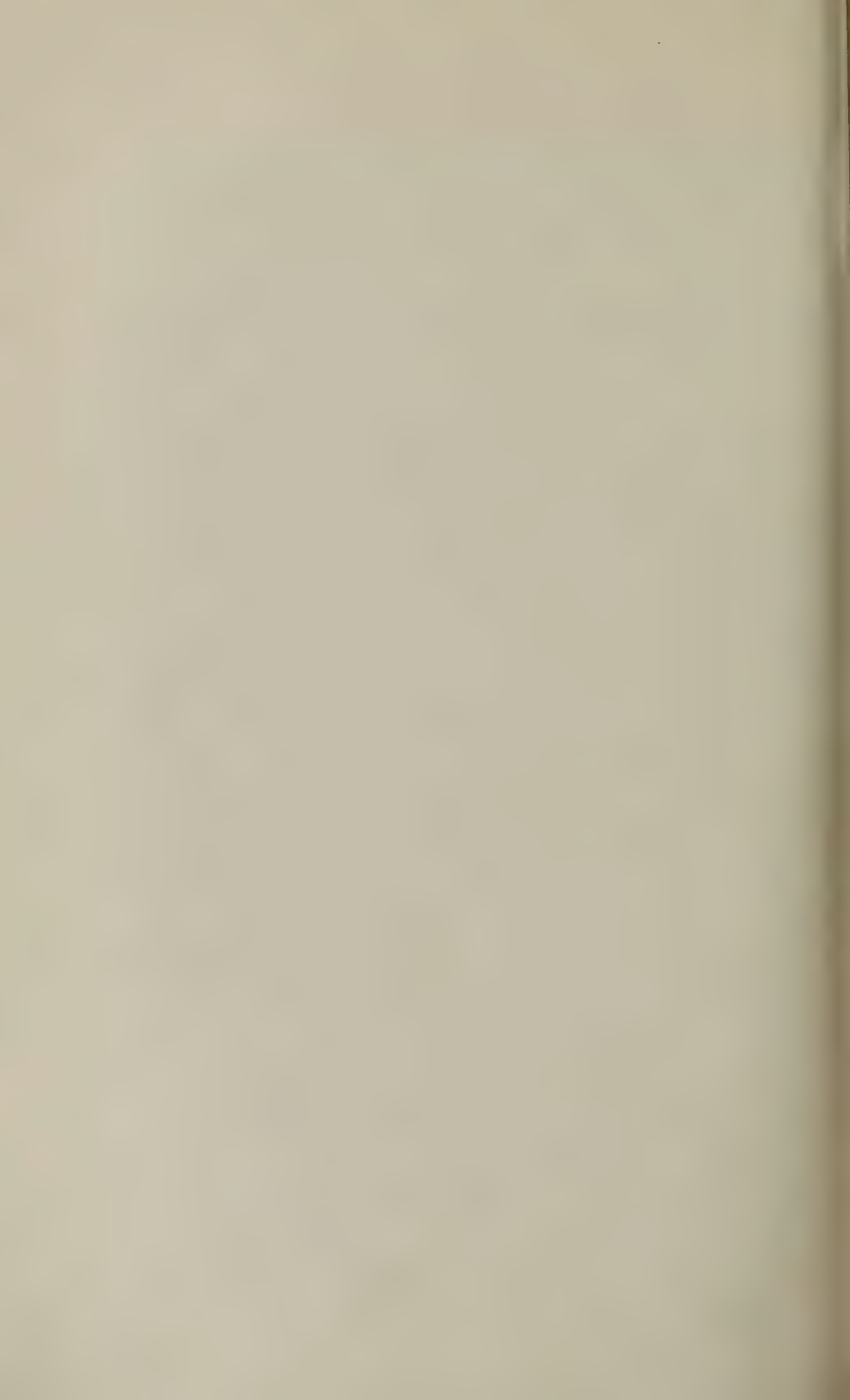
Filed December 26, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



United States Circuit Court of Appeals

For the Ninth Circuit

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW, and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a Corporation,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court
for the District of Oregon.

ISHAM N. SMITH,

418 Mohawk Building,
Portland, Oregon,

Attorney for Appellant

FILED



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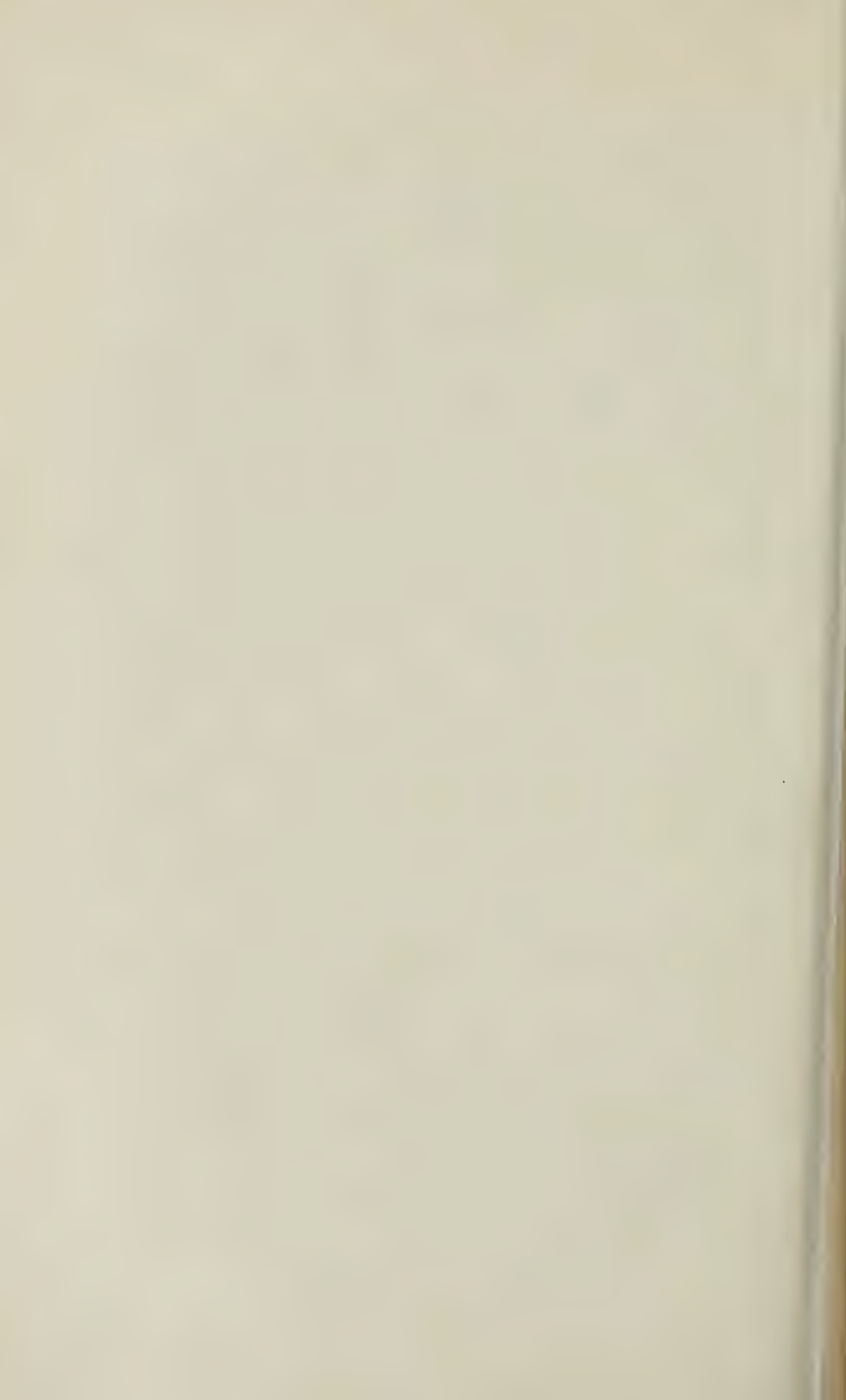
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United States Circuit Court of Appeals

For the Ninth Circuit

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal
Corporation, et ali.

Appellees.

APPELLANT'S BRIEF

STATEMENT OF FACTS

J. B. C. Lockwood, appellant, brought this suit in the district court for Oregon against the above defendants seeking temporary and permanent injunctions restraining the defendant City and its council from passing certain ordinances vacating designated portions of East 8th and Clackamas streets in Holladay's addition, Portland, upon the petition of the remaining defendants; and preventing appellee Oregon Real Estate Company from breaching its covenants in a deed from it to appellant, which conveyed to appellant certain lots, in such addition, as per plat, and thereby also conveyed as we claim, private easements and rights of way over the area in contest; also, restraining that company and

appellee School District from destroying appellant's easements, and appropriating the area in controversy to purposes destructive of public streets and private easements.

The lands embraced in Holladay's Addition were platted by George W. Weidler as trustee, by plat dated, acknowledged and recorded on December 17, 1870, in book M of deeds at page 302, and book I of plats, page 72, of records of Multnomah County; and, thereafter the blocks, streets and alleys designated on said plat were rededicated by deed and plat of dedication executed by Samuel M. Smith, J. H. Mitchell and George W. Weidler, and recorded on February 1, 1871, in book M of deeds at page 634, and book 1 of plats at page 73, records of Multnomah County (Tr. pp. 10, 11).

The validity of these plats was sustained and the rights acquired by purchasers of property thereunder were settled in

Steel v. City of Portland, 23 Or. 176. (182-184, per Bean, J.),

Appellee Oregon Real Estate Company, by deed dated, acknowledged and recorded June 19, 1872, in book S of deeds at page 327 of the records of Multnomah County, acquired a large portion of Holladay Addition as per plat, including the parts in controversy (Tr. pp. 12-14); complaint, allegation VI); and thereafter it deeded to appellant Lockwood by warranty deed dated, acknowledged and recorded April 6, 1908,

"all of lots numbered one (1), two (2), seven (7)

and eight (8), in block number ninety-nine (99) Holladay's Addition to East Portland now incorporated in the City of Portland, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining",

subject to certain conditions (plaintiff's Exhibit "G", Tr. pp. 73-76).

More than fifty years after the dedication of the plat and the public use of the streets shown thereon, and on September 9, 1922, the appellee School District petitioned the defendant City for vacation of designated portions of Clackamas and East 8th streets shown on the plat.

Its petition was filed September 15, 1922, and was accompanied by the consent of certain property owners, to-wit, the appellee School District No. 1, the appellee Oregon Real Estate Company, and Fred Jennings, who asked for the vacation of portions of East 8th street; and by the consent of appellee Oregon Real Estate Company and appellee School District No. 1, as to portions of Clackamas street (plaintiff's Exhibits "B", "C" and "D", Tr. pp. 43-49, all marked filed September 8, 1922).

By section 362 of the former Charter of Portland—(in effect now as an ordinance)—(Tr. pp. 28-33) the person or corporation desiring vacation of any street or part thereof is required to publish notice by advertising for four consecutive weeks in the city official newspaper that at a regular meeting of the council of said city to be had at the time stated in such notice a petition will

be presented to the council praying for the vacation of such street or portion thereof, particularly describing the same.

Such publication was made from August 10, 1922, to September 7, 1922, both dates inclusive (Tr. 49), and the matter came on for hearing at the regular meeting of the council on September 13, 1922, at which certain objections and remonstrances filed against granting the prayer of such petitions were denied and overruled (Tr. p. 51) and the prayer of the petition was granted in its entirety. Thereupon, the ordinances vacating those portions of each street were introduced before the City Council (Tr. pp. 52, 53, also 56, 57).

These ordinances were read the first and second times on September 15, and the third time on September 27, 1922, and were thereupon unanimously passed.

Both petitions for vacation state with appropriate change of description, substantially,

“That the purpose for which the ground is proposed to be used, which your petitioner herein seeks to have vacated, is for general private purposes the same as the adjacent ground, and particularly for residential purposes and school purposes.

“That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the west, being Block 96, the said School District contemplates the purchase of Blocks 95, 97 and 98 of Holladay Addition, and on which the proposed new Holladay School is to be located and the vacation of that

portion of said street will add to and be beneficial to the public in connection with said school."

The complaint alleges that appellee Oregon Real Estate Company owns Blocks 95, 97 and 98 of Holladay Addition and has entered a contract to sell said blocks and portions of both streets to appellee School District upon the condition precedent that the designated portions of each street shall first be vacated so that the Real Estate Company may become reinvested with title thereto and may transfer them with designated blocks to the School District.

It is charged that the vacations sought do not rest in public necessity; that neither portion of either street is dangerous to travel nor unfit for use nor has been abandoned by the public; that the City of Portland has means with which to keep up said portions of said streets; that no public interest requires the vacation of either portion of said streets; that neither portion of either street is now or ever was a menace to the public health, and public welfare, or the public safety, and that each portion of each street is hard surfaced, is in first class condition of repair, is safe for travel, is needed for travel, is used by the public generally as a means of egress and ingress for transportation and as thoroughfares for passage from various parts of the City of Portland to other parts thereof; that such portions of each of said streets are not inherently dangerous but are safe; are much used by the inhabitants of Portland generally, and more especially by the residents of Portland who have built homes within and who resided within the limits of Holladay Addition (Tr. p. 19).

The original complaint (Tr. pp. 5-58) was filed on September 23, 1922, prior to the final passage of the ordinances. All defendants were duly served, but the Oregon Real Estate Company has never appeared in the cause.

The City and the School District filed their motions to dismiss the original bill (Tr. pp. 61-65) and upon hearing the court refused the temporary injunction sought by plaintiff.

Thereafter the ordinances were passed, and thereafter on October 17, 1922, plaintiff filed his amendment to his bill (Tr. pp. 66-77) and his supplemental bill (Tr. 77-84), setting out more fully his original rights, showing the passage of the ordinances, asserting his rights under his deed, and stating that after his purchase of his property and upon reliance of his rights *under the deed and plat as an entirety* he expended thousands of dollars in improving the property, and also in hard surfacing the streets of Holladay Addition.

The City and the School District again filed motions to dismiss (Tr. pp. 84-88) which upon hearing were thereafter sustained, and decree of dismissal was entered. (Tr. p. 89.)

The appellant alleges that he acquired by virtue of his deed (Exhibit "G", Tr. pp. 73-76), not only the specific lots described therein, but also as appurtenant thereto, every easement, privilege and advantage which the plat or map represents as part thereof; furthermore, that in addition to his public rights to the streets shown on the plat he has an easement or private right

of way by deed thereover; that appellee Oregon Real Estate Company is estopped from signing the petition for vacation because it sold him his lots under the plat, and appellee School District is estopped because it has the same rights under the plat as he claims.

Appellant alleges that the street vacation is for private purposes to enable Oregon Real Estate Company to sell the property vacated, with certain abutting blocks, to the School District, for use for school purposes; that such vacation and the use of the streets for school purposes will deprive him of the use of such property not only as a public street but will take from him his private easements; that the whole proceeding violates his rights under the due process and equality clauses of Article XIV, Section 1, and the contract clause of Article I, Section 10, of the Federal Constitution, as well as the clause prohibiting appropriation of private property for public use without compensation, under Article I, Section 18 of the Oregon Constitution.

Appellant seeks to prevent the construction of buildings over the designated portion of said streets, to restrain the appropriation of such streets to purposes destructive of his rights therein, and to keep title to his easements and rights of way, and seeks general relief.

As above noted, the court dismissed the bill and made no order transferring the cause to the law side.

Appellant relies upon the following errors (Tr. pp. 93, 97) :

The Court erred

I.

In holding and deciding that the motions to dismiss the above cause on the original complaint, as well as the amendment to the complaint and supplementary complaint, were well taken.

II.

In dismissing said cause upon the motion of defendants, the City of Portland and its respective officers, George L. Baker, Mayor, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor.

III.

In dismissing said cause on the motion of defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, and its directors, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering.

IV.

In not overruling said motions and each of them and in refusing to issue the injunction prayed for in said cause, for the following reasons:

(a) Plaintiff, J. B. C. Lockwood, purchased property described in the complaint according to the recorded plat of Holladay's Addition, Portland, Oregon;

(b) By such purchase he acquired a private ease-

ment and right of way over, along and across all of the streets and thoroughfares designated on said plat;

(c) Defendant City of Portland and its officers, and defendant School District No. 1 and its officers, and defendant Oregon Real Estate Company, have conspired together to take from plaintiff his rights of way and easements over and across the designated portions of the streets vacated, without compensation, without public necessity, and contrary to law, and in violation of the rights of plaintiff guaranteed by both the state and federal constitutions as set forth;

(d) This suit to quiet plaintiff's title in and to the designated portions of streets in controversy is his only remedy; damages at law are not compensatory;

(e) By plaintiff's deed he acquired private rights of way over and along said streets and all of them, and private rights of ingress and egress to and from his property described in the complaint, which is a different property right from that of the general public in said streets and highways, and is a private property right of plaintiff; and by the proceedings complained of defendants and each of them have sought to take and by the decree of the Honorable District Court they are permitted to take the private property rights of this plaintiff in real estate without compensation, and without public reason or necessity.

(f) The ordinances of the City of Portland purporting to vacate said streets are, and each of them is, void as to the private right of this plaintiff sought to be enforced by this proceeding..

V.

In sustaining the motion of defendants to dismiss said cause and in holding and deciding that the complaint did not state facts sufficient to constitute grounds for relief in equity, and in holding and deciding that plaintiffs remedy, if any, is at law, and in dismissing said bill.

Appellant relies for reversal upon the following

POINTS AND AUTHORITIES

POINT 1

Where an owner of land plats the same into lots, blocks and streets, and sells lots with reference to that plan or map, the purchaser of a lot under such plat acquires as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the dedicated tract.

Rowans Ex'rs v. Portland (Ky.), 8 B. Munroe,
232, 237.

The above citation is a leading American authority upon the subject and illustrates the reasons for the rule. The principles as there stated have been adopted as the law of Oregon.

Carter v. City of Portland, 4 Or. 339, (346 et seq).

Nicholas v. Title & Trust Co., 79 Or. 226; 154 Pac. 391; Ann. Cas. 1917 A, 1149 (1154), (collating Oregon cases).

McCoy v. Thompson, 84 Or. 141 (collating Oregon cases).

And such is the general law as applied by both state and federal courts.

19 C. J. 928, Sec. 127, and cases.

See also

Gormley v. Clark, 134 U. S. 338; 33 L. 909.

Cox v. Hart, 145 U. S. 376; 36 L. 741.

Jeffries v. East Omaha Land Co., 134 U. S. 178; 33 L., p. 872.

Central Trust Co. v. Hennon (6th C. C. A.), 90 Fed. 593.

Paine v. Consumers Trust Co. (6th C. C. A., per Taft, J.), 71 Fed. 626.

London and S. F. Bank v. Oakland (9th C. C. A., per Hawley, J.), 90 Fed. 691.

Davenport v. Buffington (8th C. C. A., per Sanborn, J.), 97 Fed. 234.

POINT 2

The lot owner's private right so acquired is separate from and survives the extinction of the public right. He holds rights of way over every street on the plat as easements, appurtenant to his lots.

Van Buren v. Trumbull (Wash.) (per Chad-

wick, J.), 92 Wash. 691; 159 Pac. 891; L. R. A. 1917 A 1120 (extended note).

In the Washington case the court says:

“No cases going to the exact state of facts with which we have to deal have been cited by counsel, nor have we, after considerable search been able to find any. Resort must be had to fundamental principles.”

Although the Washington court deplores the paucity of authority, the annotator cites numerous cases sustaining the rules, but omits the following:

Sandstrom v. O.-W. Etc. Co., 75 Or. 159, 162, 165, says:

“Having purchased the property with reference to the dedicated streets appearing on the plat, the plaintiff was entitled to the use of those highways as an appurtenance to his premises * * * *but, as he passed along the street with other members of the general public he had a privilege which no other person possessed, to-wit, that of entering upon his close from that street, and prior to the construction of the road in the exercise of his prerogative he could approach his premises from the east as well as from the west, etc.*” (Italics ours.)

Steel v. City of Portland, 23 Or. 176;

Gormley v. Clark, 134 U. S. 338; 33 Law 909, says:

“Whether the plat was a statutory plat, or not, as to which some issue is made by the answer, the proofs establish such a dedication as created an easement in the petitioner, the existence of which

Gormley was estopped to deny, and which the court was justified in protecting (citing cases). *The right of way as appurtenant to those blocks and lots passed to the purchasers under the sale upon the trust deed, etc.*" (Italics ours.)

Central Trust Co. v. Hennen, 90 Fed. 593 (596), 6 C. C. A., says:

"(596) It is very clear that the action of the Hancock County Court in discontinuing the state road as a public highway could have no effect on any right of way vested in her by contract or otherwise independently of any action of said county court in establishing or maintaining the road as a public highway."

Paine v. Consumers F. & S. Co., 71 Fed. 626 (628), 6 C. C. A. (per Taft, J.)

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56.

19 C. J. 933, Sec. 135, says:

"But according to the better opinion if a road is a public highway the easement so granted survives the extinguishment of the public easement by the discontinuance of the highway by act of law; *for these private easements are independent of the public easement and are in their nature as indestructible by acts of the public authorities or of the grantor of the premises as is the estate itself which is the subject of the grant.*" (Italics ours)

See also McCoy v. Thompson, 84 Ore. 141 (147).

The dedicator, the owner or the vendor who sells lots according to a plat is estopped from denying the private easement as well as from doing anything contradictory

to or destructive thereof. The purchaser's rights of private easement rest in contract, and the covenants of the deed protect the purchaser as against any act by the dedicator, the vendor or the owner conflicting therewith.

Paine v. Consumers F. & S. Co., 71 Fed. 626 (6 C. C. A.) says '(Per Taft, J.) :

"(71 Fed. 628) In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed (citing cases). It is quite true that it has been held that such a deed does not bind the grantor to open and maintain a street in a condition fit for travel (cases) ; nor does it imply a covenant that the street is in such a condition when the deed is made. *The only effect is that, as between the grantor and the grantee, the latter may do nothing inconsistent with this right. Between them, therefore, it is a street.*" (Italics ours.)

Steel v. City of Portland, 23 Or. 176 (at 183), construing the plats in question, says (Per Bean, J.) :

"*The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which the lots are sold (citing Oregon cases).*" (Italics ours.)

Gormley v. Clark, 134 U. S. 338; Book 33 L. 909 at 914 says:

"Whether the plat was a statutory plat or not, as to which some issue is made by the answer, the proofs establish such a dedication as created an easement in the petitioner, the existence of which Gormley was estopped to deny and which the court was justified in protecting."

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56 (at 58), says:

"The owner is estopped to deny the existence of the dedication whenever private rights intervene. * * * The sale and conveyance of lots according to the plat imply a covenant that the streets and other public places indicated on the plat shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use. * * * Deeds made with reference to such plat will estop the owner to deny the existence of a dedication. * * * *Equity* will not permit such an injustice but *will enforce*, at the suit of individual lessees to whom rights and privileges have been granted by the deeds creating their terms, *the implied covenant in their leases against any act of the grantor which shall interfere with the free use by the public of the public grounds.*" (Italics, ours.)

Christian v. Eugene, 49 Or. 170 (at p. 173) says:

"The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest."

Oregon City v. O. & C. Ry. Co., 44 Or. 165 (176) (Bean, J.) says:

"When, therefore, the Harveys, after acquiring

title from the State, without making any change or alteration in the McLoughlin map, sold and conveyed lots with reference thereto, they thereby ratified, approved and dedicated to the public the streets, alleys and public places shown thereon, as completely and fully as if they had themselves made and formally acknowledged the map."

And at pp. 178-9 the court says:

"The dedication is binding on the donors and their successors in interest, and can only be revoked by them when the purpose for which it was made has entirely failed. 'It would be unreasonable and unjust,' says Mr. Chief Justice Thayer, 'to allow a town proprietor to revoke the dedication of any street indicated upon the plat of the town for the reason that the corporate authorities of the town had not specially accepted it as a street, nor the public actually entered upon and used it as such. *The proprietor proposed to the public in the outset that the ground represented as the street should forever remain open to be used for that purpose, and upon a sale of lots and blocks by reference to such plats he precluded himself from making any other or different disposition of it.*" (Italics, ours.)

Jacobs Pharmacy Company v. Luckie (Ga.),

Ann. Cas. 1917 A, p. 1105,

has an extended note collating authorities from all the State and Federal Courts. Discussing the rule in Oregon the author says (p. 1136):

"And likewise the sale and conveyance of lots with reference to a plat of the town laid out by a prior owner, amounts to a ratification, approval and dedication to the public of the streets, alleys and public places shown thereon as completely and fully

as if the subsequent owners of the property had themselves made and formally acknowledged the map."

POINT 3

The Oregon Real Estate Company joined in procuring vacation of both portions of both streets (Tr. pp. 49 and 49). Such acts conflict with its own deed to plaintiff. By such proceedings it seeks to devote the property to purposes other than street purposes, and hence it was and is estopped from participating in such vacation.

Extended Note, Ann. Cas. 1917 A, p. 1109, collating Federal and state cases and discussing Oregon rule at p. 1136.

By estopping the Oregon Real Estate Company as a consenting owner, the remaining consentors are insufficient under the charter (Tr. pp. 28-29) and the entire proceedings are void.

POINT 4

The petitions, ordinances and vacation proceedings are void because they show no public necessity for such vacation; but, on the contrary, they both show the purpose of the vacation is for private, residential and school purposes.

37 Cyc. 179.

McQuillan Minn. Corp. (Ed. 1912), Vol. 3, Sec. 1403, p. 2985.

Portland Charter, Sec. 52 Subd. 12 (Tr. p. 26).

Portland Charter, Sec. 362 (now an ordinance),
(Tr. pp. 28-29).

POINT 5

The petition for vacating 8th street did not have sufficient signers under the charter.

The requirement is that in measuring the area affected by the vacation, an extension of two hundred feet from either termini of the vacated street is included and that two-thirds of the property owners on both sides of the street must sign the petition.

In the case of 8th street this was not done.

POINT 6

Equity has jurisdiction in this case and injunction is the proper remedy.

Tooze v. Ry. Co., 77 Or. 157.

Nicholas v. Title & Trust Co., 79 Or. 226
(Syllabus Point 1).

Bostwick v. Hosier, 97 Or. 125 (190 Pac. 299).
19 C. J. 992, Sec. 253, also p. 996, Sec. 258.

Gormley v. Clark, 134 U. S. 338; 33 L. 909.

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 56.

POINT 7

The authorities apparently conflict upon the question of the right of a lot owner to an easement over all the streets shown upon the plat. Some hold that lot owners have such rights of way over such streets only

as are necessary for use in connection with their particular property; others hold that the lot owner acquires an easement over every street shown on the plat.

The apparent conflict is soluble by keeping in mind the rule of unity between plat and deed, by which all rights conferred by the plat are treated as a unit with the deed. Under this "unit rule" the purchaser's rights include every street in the plat.

Rowans Ex'rs v. Portland, 8 B. Monroe, 232.

Carter vs. City of Portland, 4 Or. 339.

Steel v. City of Portland, 23 Or. 176, 31 Pac. 479.

19 C. J. 931, Sec. 130.

Sandstrom v. O-W. R. & N. Co., 75 Or. 159.

Morse v. Whitcomb, 54 Or. 412, Point 12.

Bostwick v. Hosier, 97 Or. 125, 190 Pac. 299.

POINT 8

Aside from the question of public rights to public streets, the case involves the protection and enforcement of private rights acquired under the deed from appellee Oregon Real Estate Company to appellant (Ex. "G," Tr. p. 73), as appurtenant to the lots conveyed.

Such rights are cognizable in and are enforced and protected by courts of equity, by appropriate remedies.

Extended note, Ann. Cas. 1917 A, p. 1109,
collating Oregon cases at p. 1136.

Tooze v. Ry. Co., 77 Or. 157.

- Nicholas v. Title & Trust Co., 79 Or. 226.
 McCoy v. Thompson, 84 Or. 141.
 Bostwick v. Hosier, 97 Or. 125 (190 Pac. 299).
 McFarland v. Lindekugel (Wis.), 83 N. W.
 757 (758).
 Hall v. Breyfogle (Ind.), 70 N. E. 883, Point 7.
 (Unity rule.)
 Smith v. Garbe, 86 Neb. 91; 124 N. W. 921; 136
 Am. St. 674 (679—the question stated).
 Stevenson v. Lewis (Ill.), 91 N. E. 56.
 La Bounty v. Seattle (Wash.), 89 Pac. 481.
 37 Cyc. 192, par. (e).
 28 Cyc. 840, 841.
 Providence Steam. Eng. Co. v. Providence S. S.
 Co., 12 R. I. 348; 34 Am. Rep. 652.

POINT 9

The charter provisions, petition, ordinances and acts of vacation are void,

(a) For conflict with appellant's rights under the equality and due process clauses of Article XIV, Sec. 1, and the contract clause of Article I, Sec. 10 of the Federal Constitution.

- Penn. Coal Co. v. Mahon, 43 Sup. Ct. Rep. 158
 (Published Jan. 15, 1923).
 Smith v. Cameron (Ore.) 210 P. 716 (adv. sheets
 Jan. 8, 1923).
 Hill v. Standard Min. Co., 12 Idaho 223 (at
 239) quoting.
 Drake, Ex. v. Lady Easley Coal Co., 102 Ala.

501; 48 Am. St. 77; 14 So. 749; 24 L. R. A. 64, says:

“It is further said: ‘Under the provisions of the constitution, private property cannot be taken for public use or for corporations, without just compensation being made to the owner, except by consent. The courts—and it was never intended to be otherwise understood—are not ‘masons’ to ‘chisel’ away vested rights of property of private individuals, however humble or obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his country.’”

(b) Because of an attempted appropriation of private easements for private purposes, without compensation.

Tooze v. Ry. Co., 77 Or. 157; 150 Pac. 252, 254, holding that the protection extends to easements over streets, and to small, as well as large, rights.

Myres v. Clackamas County, 98 Or. 391, Point 3.
Pac. El. Co. v. Portland, 65 Or. 349, Point 18.
Bostwick v. Hosier, 97 Or. 125, 190 Pac. 299.

(c) Because the whole proceedings for vacation are an attempt, indirectly, to amend the plat, as against purchasers.

Myers v. Clackamas County, 98 Or. 391.
Miller v. Fishers, 90 Or. 111 (at p. 114),

and to avoid condemnation proceedings, as required by State and Federal Constitutions.

Penn. Coal Co. v. Mahon, 43 Sup. Ct. Rep. 158.

(Published Jan. 15, 1923.)

Tooze v. Ry., 77 Or. 157.

(d) And are violative of Art. XI, Sec. 4, Oregon Constitution and Secs. 7108 et seq. Ore. Laws, because no provision is made at any stage of such proceedings to compensate Lockwood for his destroyed easements.

POINT 10

The lower court held that plaintiff's remedy, if any, was at law for damages, and dismissed the bill. This is error; because, if true, the cause should have been transferred to the law side.

Federal Equity Rule, 22.

Hopkins Fed. Eq. Rules, 3rd. Ed., pp. 162-4
(Cases).

ARGUMENT

The appellant bases his claim of right upon the dedicated plat showing, as it does, the various streets, thoroughfares and highways in Holladay's Addition, and his deed (Tr. p. 73, plaintiff's Exhibit "G") conveying certain lots with reference to the plat.

POINT 1

UNITY RULE

The authorities heretofore cited hold that where a deed refers to a plat for description of the property conveyed, the deed and plat are one instrument, and every right, privilege, advantage and easement shown on the plat is appurtenant to every lot sold with reference thereto.

Under this unity rule a lot purchaser acquires rights of way and easements over every thoroughfare and street shown upon the plat, and is not limited to those immediately surrounding or convenient for approach to his property.

One of the leading cases in America upon this subject is

Rowan's Ex're v. Portland, 8 B. Munroe 232
(47 Ky.).

It says:

"This map, therefore, is to be assumed as the

representation of the town in which the lots were sold; and not as a merely verbal, but as a written and recorded representation of its localities and divisions, its streets, alleys, thoroughfares, commons and public grounds, so far as they are indicated by it. In all these respects it is to be regarded as having entered into and formed a part of every contract for the sale of a lot in the town, by its number or position in the plan, and as having been adopted and confirmed by every conveyance of a lot described by similar reference. It is, in fact, identified with the town itself; and every reference to, or recognition of the town, is a recognition of the plan by which its various divisions and the localities and uses of its different parts are identified. It cannot be doubted that every purchaser of a lot according to the plan, acquired an interest in it not only as evidence of the position of his purchase, but as evidence also of the several advantages and privileges pertaining to the town and the lots, as indicated by the plan, and especially as evidence of the localities, divisions and uses of its various parts as therein presented. Nor can it be doubted that in purchasing and paying for his lot, he purchased and paid for, as appurtenant to it, every advantage, privilege and easement which the plan represents as belonging to it as a part, or to its owner as a citizen of the town, and that a conveyance of each lot with reference to the map, or merely as a part of the town, was a conveyance of all these appurtenances as ascertained by the map which is the basis of the town as such, and identified with it. These conveyances, then, in connection with the map, to which they must be understood as referring, whether expressly or not, and the declaration indorsed by Lytle, that all sales were to be regulated by the map, operate as a conclusive grant or covenant securing to the purchasers and to the town, all advantages, privileges and easements appearing by

the plan to be appurtenant to the lots or the town, and this without any other aid from parol testimony than is always and necessarily admissible in identifying the subjects and fixing the application of written instruments. * * *

“The right which, as we suppose, passes to the purchasers of lots as appurtenant thereto, is not the mere right or privilege that each purchaser may use the streets and other public places according to their appropriate purposes; but the right acquired by each purchaser, that all persons whatever, as their occasions may require or invite, may so use them; or, in other words, we suppose the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers, that the streets and other public places indicated as such upon the plan, shall be forever open to the use of the public, free from claim or interference of the proprietor inconsistent with that use.”

OREGON CASES

The principles stated in the Kentucky case were adopted by the Supreme Court of Oregon at an early date and have remained unqualified since.

Carter v. Portland, 4 Or. 339, cites

Rowan's Ex'rs v. Portland, 8 B. Munroe, 232, among other cases, and holds

“(4 Or. 346) We are of opinion that if one owning land, or having an equitable interest therein, subsequently acquires the title thereto, lays out

thereon a town and makes and exhibits a plan thereof with spare ground marked as streets, alleys, public squares or parks, and sells lots with clear reference to that plan or map, the purchasers of the lots acquire as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the town (citing cases)."

Hogue v. Albina, 20 Or. 182 (186) says:

"That the sale and conveyance of lots according to such plan or map implies a grant or covenant that the streets or other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on the faith of which the lots are sold."

Meier v. Portland Ry. Co., 16 Or. 500, says:

"(507) Where, however, a town proprietor lays off his land into town lots, indicates streets upon the plat thereof, and offers the lots for sale, he has a purpose to accomplish by dedicating such streets and that he intends it to be irrevocable is beyond the possibility of a doubt. The proprietor expects, and the purchasers of lots understand, when they purchase, that the streets shown upon the plat will forever remain open to public use. * * *

* * * "(16 Or. 510) When a person maps off his land into town lots and offers his lots for sale by reference to the map, there is no mistaking his intention. He designs, if he is honest, that the streets shall belong to the public and that they will be accepted and used by it as such whenever the public necessity or convenience requires it. * * *

The public exigencies requiring the use of the property may not arise for years, but that will not, where

he has induced parties to invest in his scheme, release him from the obligation of his agreement. *His gift is unconditional, and he can never revoke it without the intervention of circumstances rendering it impossible for it to take effect.*" (Italics ours.)

The law thus stated was applied directly to the plats in question in

Steel v. City of Portland, 23 Or. 176.

The court says (per Bean, J.) :

"At the argument it was claimed by plaintiff's counsel that neither of the maps or plats was acknowledged in the manner provided by statute, but we regard that question as wholly immaterial in this case because *it has repeatedly been held by this court, and the law is well settled*, that where the owner of land lays out and establishes a town and makes and exhibits a map or plan thereof, with lots, blocks and streets marked thereon, and sells and conveys lots by reference to such plan or map, he thereby dedicates to the public the streets and public places thereon; * * * *The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which the lots are sold* (citing Oregon cases). There is no difference in the principles applicable to the dedication of public streets and public squares or parks; in each case the dedication is to be considered with reference to the use to which the property may be applied or the purpose for which the dedication is made, and this may be ascertained by the designation which the owner gives to land." (Italics ours.)

These principles have never been departed from, but have been reiterated in numbers of Oregon cases. See

- Nicholas v. Title & Trust Co., 79 Or. 226; 154 Pac. 391; Ann. Cas. 1917 A, 1149 (1154) (collating Oregon cases).
McCoy v. Thompson, 84 Or. 141 (collating Oregon cases).

A multitude of state and federal authorities supporting this rule is cited in

19 C. J. 928, Sec. 127.

The following federal authorities announce and apply the same rule:

- Gormley v. Clark, 134 U. S. 338; 33 L. 909.
Cox v. Hart, 145 U. S. 376; 36 L. 741.
Jeffries v. East Omaha Land Co., 134 U. S. 178; 33 L. 872.
Central Trust Co. v. Hennon (6th C. C. A.), 90 Fed. 593.
Paine v. Consumers Trust Co. (6th C. C. A., per Taft, J.), 71 Fed. 626.
London and S. F. Bank v. Oakland (9th C. C. A., per Hawley, J.), 90 Fed. 691.
Davenport v. Buffington (8th C. C. A., per Sanborn, J.), 97 Fed. 234.

Sandstrom v. O-W. R. & N. Co., 75 Or. 159 (at 164-7) reiterates the rule and sustains it by copious citations from Oregon and elsewhere.

The effect of these decisions is that Oregon has adopted the *unity rule* as stated in

Rowan's Ex'rs v. Portland, 8 B. Munroe 232,

which sustains the doctrine that *all* the rights of way shown by the plat pass as appurtenant to the purchaser of every lot under the plat.

POINT 2

PRIVATE RIGHTS UNDER DEED REFERRING TO PLAT

A lot owner purchasing land and acquiring deed by reference to a plat acquires not only the rights of the general public to the use of the streets shown on the plat, but *he also acquires easements independent of the public easement which in their nature are as indestructible by the acts of the public authorities, or the dedicator, or the grantor or the vendor of the premises as is the estate itself which is the subject of the grant.*

The deed from the Oregon Real Estate Company to Lockwood (Tr. p. 73, plaintiff's Exhibit "G") conveys the lots

"together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,"

and the easements and rights of way shown on the plat are embraced within the grant of the appurtenances.

19 C. J. 933, Sec. 135, says (inter alia):

"But according to the better opinion if a road

is a public highway the easement so granted survives the extinguishment of the public easement by the discontinuance of the highway by act of law; *for these private easements are independent of the public easement and are in their nature as indestructible by acts of the public authorities or of the grantor of the premises as is the estate itself which is the subject of the grant.*" (Italics ours.)

Van Buren v. Trumbull (Wash.), 92 Wash. 691; 159 Pac. 891; L. R. A. 1917 A p. 1120 (extended note).

Sandstrom v. O-W. R. & N. Co., 75 Or. 159 (165).

Steel v. Portland, 23 Or. 176.

Gormley v. Clark, 134 U. S. 338; 3 L. 909, says:

"The right of way as appurtenant to those blocks and lots passed to the purchasers under the sale upon the trust deed."

Central Trust Co. v. Hennon, 90 Fed. 593, 596.

Paine v. Consumers F. & S. Co., 71 Fed. 226 (628).

Stevenson v. Lewis, 244 Ill. 147; 91 N. E. 76.

The cases of

Gormley v. Clark, 134 U. S. 338, and
Stevenson v. Lewis, 264 Ill. 147.

just cited, are instructive.

Gormley v. Clark involved the attempted vacation of streets at Glencoe, Illinois, after the Chicago fire. The right of the individual purchaser of lots to easements

over all those streets, and to enjoin the owner and dedicator from procuring the vacation of those streets and from putting them to any use inconsistent with that granted by the deed and plat, was sustained.

Stevenson v. Lewis, 244 Ill. 147, 91 N. E. 56, arose from Zion City, Illinois, and involved the right of the dedicator to vacate a plat after leasing lots as per plat to individuals. The court says:

“The effect of this attempted vacation upon the rights of the lessees of lots within the subdivision is the question upon which the case turns.”

The court sustained the rights of the lessee as against the dedicator, and used this language:

“(91 N. E. 59, lower left hand column) If Dowie had the right on October 1, 1901, to vacate Shiloh Park and the portions of streets included in his deed of vacation of that date, regardless of the interests of the lessee, why may not his successors in title vacate now all the streets and alleys in the City of Zion? No lot has been sold, and Dowie's grantee is the sole owner of the fee. Equity will not permit such an injustice, but will enforce, at the suit of individual lessees to whom rights and privileges have been granted by the deeds creating their terms the implied covenant in their leases against any act of the grantor which shall interfere with the free use by the public of the public grounds.”

Oregon City v. O. & C. R. Co., 44 Or. 165, announces the rule which sustains our contention that when the Oregon Real Estate Company acquired portions of

Holladay Addition (Tr. pp. 12-14) per recorded plats, and thereafter sold lots based upon the same plat, it thereby ratified, approved and dedicated to the public the streets, alleys and public places shown on the plat as completely and fully as if it had made the plat of dedication.

Christian v. Eugene, 49 Or. 170 (173) says:

“The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest.”

Ann. Cas. 1917 A, p. 1109,

contains an extensive note collating many federal and state cases upon this subject. The author quotes from

Grogan v. Hayward, 4 Fed. 161, 6 Sawyer 498:

“The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser, and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased.”

POINT 3

THIS CASE INVOLVES THE ENFORCE-
MENT OF THE PURCHASER'S PRI-
VATE, AS WELL AS HIS PUBLIC,
RIGHTS

Under the authorities cited in Point 8 (this brief) the instant case involves the enforcement of the private rights of contract. Appellant's deed (Tr. p. 73, Exhibit "G") is a general warranty with full covenants. The specific lots are conveyed together with their appurtenances, etc., and the deed reads (Tr. p. 74) :

"And the said Oregon Real Estate Company, the grantor above named, does covenant to and with J. B. C. Lockwood, the above named grantee, his heirs and assigns, that the above granted premises are free from all encumbrances, and that it will warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever."

Lockwood paid that company \$9000 for the lots with their appurtenances as per plat. He has spent thousands of dollars in building a fine residence upon his lot and in improving and paving the streets; and, after all these years, Oregon Real Estate Company breaches it covenant with him by procuring the City Council to vacate portions of the streets so that it can sell them to the School District.

By these acts the grantor (Oregon Real Estate

Company) has breached its covenants of title, possession and enjoyment in its deed, because

(a) They destroy the appurtenant easements and rights of way of appellant;

(b) They devote the streets to purposes antagonistic to and destructive of the public and private rights of way embraced within the covenant;

(c) They take Lockwood's private property without compensation and without public necessity, without his consent.

The protection and enforcement of Lockwood's private rights are therefore embraced within the bill and are clearly distinguished from the public rights.

Smith v. Garbe, 86 Neb. 81; 124 N. W. 921;
136 Am. St. 674

says, quoting from

Jarvis v. Steel Milling Co., 173 Ill. 192; 60
Am. St. 107, 50 N. E. 1044:

"The question here is not, as assumed by appellant, whether the mill can be operated without the mill pond, but whether the use of the mill pond passed as a necessary appurtenant of the mill property."

So, at bar, the question is not whether Lockwood has means of ingress and egress to his property over streets other than those vacated, but the question is, did Lock-

wood acquire as appurtenant to his property the rights of way and easements over the streets in controversy.

Tooze v. Willamette Valley R. Co., 77 Or. 157, protects by injunction the right of the small owner as against the claim of the railroad company.

Sandstrom v. O-W. R. & N. Co., 75 Or. 159, protects the property owner in his right to approach his property from both directions, whereas he had ample approach from one direction after the railroad company had closed the other approach.

Nicholas v. Trust Co., 79 Or. 226.

McCoy v. Thompson, 84 Or. 141.

Bostwick v. Hosier, 97 Or. 125, holds (syllabus) :

“Owners of lots who purchased their property with reference to a plat, designating certain streets giving access thereto, have a usufruct in the streets which cannot be taken from them for private use by vacating a portion of the streets, regardless of the ownership of the fee in the streets.”

“Owners of lots, in blocks adjacent to streets which it was proposed partially to vacate for private use, suffer an injury different from that to the general public, and can prevent such vacation, though no part of the street touching their lots was included in that vacated.”

Earll v. Chicago, 136 Ill. 277, 26 N. E. 370, says:

“(26 N. E. 372) That if the owner of land exhibits a map or plan of a town, or addition platted

thereon, and on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever; and such right is not a mere right that the purchaser may use that street, but is a right vesting in the purchasers that all persons may use it—that the sale and conveyance of lots according to the plat implying a grant or covenant to the purchasers of lots and their grantees that the public street indicated upon the plat shall be forever open to the use of the public as a public highway free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use, and that the owner, and all claiming under him, will be perpetually estopped from denying the existence of the streets.”

Hall v. Breyfogel (Ind.), 70 N. E. 883, says (syllabus, point 7) :

“(70 N. E. 885) The purchaser of a lot in the platted district acquires a vested right in an easement of the street, not only in the street in front of his purchase, but in all the streets of the platted district designated as such on the plat, and the right to have them all kept open.”

LaBounty v. Seattle (Wash.), 89 Pac. 480 (at 481) says:

“The authorities are clear to the effect that, where a plat is filed and streets dedicated to the public and accepted, and lots sold with reference thereto, the dedicator cannot afterwards, at his own will, change the plat by vacating a street or any part of one” (citing numerous cases).

Providence Steam Engineering Co. v. Providence, Etc. S. S. Co., 12 R. I. 348, 34 Am. Rep. 652, says:

“(Syllabus) A riparian owner platted his land into streets, lots and squares, one of such streets being below high water mark; the street was subsequently filled out; but was subsequently closed by the owner of all the adjoining lots; held, that he could be compelled to reopen it by the owner of some of the other lots.”

McFarland v. Lindekugel (Wis.), 83 N. W. 757, says:

“(83 N. W. 758, after discussing the principle of estoppel, quoting from Donohoo v. Murray, 62 Wis. 100, 22 N. W. 167) ‘When land is so divided into lots, and a plat made, and the lots and streets marked thereon, and the owner sells a lot so designated on the plat, and for a consideration evidently affected by its situation as a lot on the public street, he is estopped from depriving the purchaser of the use of the street. He, at least, has an easement in such street to be enjoyed in connection with the lot, of which the grantor cannot deprive him, whether the public have an easement therein as a public highway or not.’ This rule is of universal application, as will be seen by reference to the following authorities (citing cases). * * * Some few of the cases put the right of the grantee upon the ground that there is an implied covenant to the use of the street, but the great majority, and with the better reason, base it upon the ground of estoppel in pais. * * * *The plaintiff is not seeking to vindicate the rights of the public, but is enforcing an individual right, resulting from the acts of his grantors in platting the property and selling*

lots with reference thereto. In that view, the judgment of the court below was wrong." (Italics ours.)

Archer v. Salinas City (Calif.), 28 Pac. 839, says:

"(841) Whenever the dedication is complete the property thereby becomes public property, and the owner loses all control over it, or right to its use. * * * If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part."

See also

Stevenson v. Lewis, 91 N. E. 56.

Gormley v. Clark, 134 U. S. 338, 33 L. 909.

Central Trust Co. v. Hennon, 90 Fed. 593.

Paine v. Consumers F. & S. Co., 71 Fed. 626
(6 C. C. A., per Taft), says:

"(71 Fed. 628) It is well settled that where a grantor bounds the lot conveyed on a described street and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes, whether it be in fact a street or not (citing authorities), and the same effect is given to a deed describing the lot conveyed by number and reference to an undedicated plat upon which the lot is shown to front upon a street. *In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed.* * * *

The only effect is that as between the grantor and

grantee the latter may do nothing inconsistent with this right. Between them, therefore, it is a street. Nor does it prevent this result that the plat was marked vacated, or that in some of the deeds it was referred to as vacated. *The vacation of the plat affected only the public easement. It did not conflict with the use of the streets as a common way by all the abutting lot owners.*" (Italics ours.)

POINT 4

ESTOPPEL

Because of the unity of relation between the plat and deed and of the vested rights thereby acquired by Lockwood, it seems superfluous to argue that the Oregon Real Estate Company having given Lockwood a warranty deed to his premises with the appurtenant easements, is estopped from breaking its covenants or from doing anything conflicting with the rights for which it has been paid. These appurtenant rights of way and easements were conveyed as effectually by the deed as were the lots themselves, and the Oregon Real Estate Company has no more right to defeat the appurtenant easements than to defeat the conveyance of the estate itself.

19 C. J. 933, Sec. 135.

Christian v. Eugene, 49 Or. 170 (at 173) says:

"The plat is as much a part of the evidence of the title of the purchaser of lots as his deed and cannot be changed or disputed by the proprietor as his interest may suggest."

Oregon City v. Railway Co., 44 Or. 165 (176).
 Central Trust Co. v. Hennon, 90 Fed. 593, says:

“(90 Fed. 596) The order of the county court in discontinuing the road as a public highway terminated the right of way of the public generally, which depended on the authority and action of the county court for its existence, and also terminated the obligation on the part of the county to maintain the road in a proper state of repair as a public highway. But the order of the county court did not and could not affect the private right of the petitioner to egress and ingress to her property, if such right existed, and could have been asserted against the Trabue heirs. *Paine’s Ex’x v. Storage Co.*, 37 U. S. App. 539, 19 C. C. A. 99, and 71 Fed. 626. *The distinction is between a right in the public to use a public highway, depending for its existence on the action of the county court, and a private right of way acquired by grant, contract, or in other valid, legal method, such as by estoppel. But the question of such right, as we have said, was one which was the duty of the court to consider and determine for itself.*”

Steel v. City of Portland, 23 Or. 176 (183) says:

“The sale and conveyance of lots according to such plan or map implies a covenant that the streets and other public places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map upon the faith of which lots were sold.”

That the principle of estoppel applies as against the Oregon Real Estate Company is settled in

McFarland v. Lindekugel (Wis.), 83 N. W. 757 (758) collating cases.

Gormley v. Clark, 134 U. S. 338; 33 L. 909.

Extended note, Jacobson Pharmacy Co. v. Luckie, Ann. Cas. 1917 A, p. 1105 (1107) collating cases.

See authorities this brief under Points 2, 3, and 8.

POINT 5

EQUITABLE JURISDICTION—INJUNCTION—MANDATORY INJUNCTION

The lower court denied jurisdiction in equity to protect these easements thus acquired. In this he committed plain error. Equity has jurisdiction to protect vested estates, and, in cases of this character, to issue injunctions or such other writs as are necessary to effectuate substantial justice.

Tooze v. Willamette Ry. Co., 77 Or. 158.

Nicholas v. Title & Trust Co., 79 Or. 226.

Bostwick v. Hosier, 97 Or. 125.

Meier v. Portland, Etc. Ry. Co., 16 Or. 500 (505).

Oregon City v. O. C. Ry. Co., 44 Or. 165 (179).

Stevenson v. Lewis (Ill.), 91 N. E. 56.

Gormley v. Clark, 134 U. S. 338.

Morse v. Whitcomb, 54 Or. 412.

19 C. J. 992, Sec. 253, also p. 996, Sec. 258.

POINT 6

VACATION PROCEEDINGS VOID—NO PUBLIC NECESSITY OR USE SHOWN—
ESTOPPEL—CONDEMNATION PROCEEDINGS
EVADED

Recapitulating, the facts show that,

(a) By deed dated June 19, 1872, Oregon Real Estate Company acquired a vast amount of property in Holladay's Addition, including all the properties in question (Tr. pp. 12-14) ; that company's charter powers enabled it to transact a general real estate business (Tr. pp. 9, 10), complaint par. IV), After it acquired title by deed as stated, it sold divers and sundry lots, parcels of land and blocks to various persons and described such property by reference to the plats in controversy (Tr. pp. 20, 21, complaint, allegation XII). During all this time the streets shown on the plat were in existence, were public streets, were dedicated, used and maintained as public thoroughfares, were in good condition and were much traveled.

The proceedings for vacation were signed by appellees, Oregon Real Estate Company, and School District No. 1, for Clackamas street (Tr. pp. 46-49) and by appellees, Oregon Real Estate Company and School District No. 1, together with Fred Jennings, for East 8th street.

The plats demonstrate that when the consent of the Oregon Real Estate Company for the vacation of such

streets is stricken from the petitions, then clearly the amount of property and number of property holders required by the charter as a basis for proceedings to vacate, do not exist. (Charter provisions, Tr. pp. 28-30, allegation XV.)

Appellant urges

MAJOR PREMISE

(1) A grantor in a warranty deed is estopped from doing anything conflicting with, destructive of, or tending to defeat the effect of the deed.

MINOR PREMISE

(2) When the Oregon Real Estate Company sought to procure the vacation of these streets, so that it might sell them to the School District, it was then promoting proceedings which conflicted with and were destructive of the interests of its grantee; and,

CONCLUSION

(3) Therefore, it is estopped to join in the proceedings for vacation.

It could no more join in proceedings to vacate these streets without payment for the private easements and rights of way than it could defeat the title to the lots themselves by similar proceedings.

Authorities, *supra*.

Its name as a consenting owner should, therefore, be stricken from the proceedings for vacation; and when this is done the proceedings fall.

(b) The ordinances passed at the instigation of Oregon Real Estate Company and the School District, seek to destroy the easements of lot purchasers under the plat to Holladay's Addition, to enable the Real Estate Company to devote appellant's property to private uses, without compensation.

This we submit is violative of the equality and due process clauses of Article XIV, Sec. 1¹ of the contract clause of the Federal Constitution.

Penn. Coal Co. v. Mahon, 43 S. C. (U. S.) 158.

Published January 15, 1923.

Smith v. Cameron (Ore.) 210 Pac. 716.

(c) The involved easements are property; they cannot be taken by the method attempted; they can only be taken by condemnation proceedings under Article I, Sec. 18, Article XI, Sec. 4, Oregon Constitution, and Or. Laws, Section 7108 et seq.

Tooze v. Willamette Valley So. Ry., 77 Or. 157,
at 162.

Bostwick v. Hosier, 97 Or. 125.

(d) Neither petition shows any public necessity for the vacation of either street.

The complaint shows that the street is fulfilling its

functions within the meaning of the charter (Sec. 8, Tr. p. 25) reading:

“A street shall be held to fulfill its function as a street by being used in any way for the purpose of travel, transportation or distribution by or for the public.”

The complaint also shows that the street is hard surfaced, is in good repair, is much used by the public, by petitioner and the residents of Holladay Addition generally; that the streets are not dangerous, are not abandoned; that the city has money with which to keep them in repair, etc.

The requisites for a petition for vacation specified in the charter are (inter alia) (Tr. p. 29):

“The petition, so to be presented to the Council shall set forth a description of the part of the street proposed or sought to be vacated, and the purpose for which the ground is proposed to be used, *and the reason for such vacation.*”

This of course means that there must be a public necessity or a public reason for the vacation itself.

37 Cyc. 179.

McQuillan Municipal Corporations, Vol. 3, Sec. 1403, p. 2985.

These petitions both show, with appropriate changes in description (Tr. 44-45):

“That the purpose for which the ground is proposed to be used which your petitioner herein seeks

to have vacated is for general private purposes the same as the adjacent ground, and particularly for residential purposes and school purposes. That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property * * * the said School District ~~contemplates the purchase of blocks 96, 97 and 98 of Holladay Addition and on which the proposed new Holladay School is to be located and the vacation of that portion of said street will add to and be beneficial to the public in connection with said school.~~ 9

The entire vacation proceedings are, as we submit, but a short cut taken to avoid condemnation proceedings as no public necessity exists therefor; and, hence, are void.

Penn. Coal Co. v. Mahon, 43 S. C. 158 (U. S. Supreme) (January 15, 1923.)

Furthermore they are void for conflict with the Oregon Constitution.

Article I, Sec. 18; Article XI, Sec. 4, Oregon Constitution.

Tooze v. Willamette Valley R. Co., 77 Or. 157.

Pac. Lumber Co. v. Portland, 65 Or. 349.

Point 18.

Bostwick v. Hosier, 97 Or. 125.

(e) By checking the property ownership on 8th street it will be found that sufficient property owners did not sign either by number or by frontage ownership, and the charter provisions was not complied with.

POINT 7

DISMISSAL OF SUIT IN EQUITY

The lower court held that plaintiff's remedy, if any, was in damages. He thereupon dismissed the suit and did not transfer it to the equity side.

This is contrary to the plain provisions of

Federal Equity Rule 22; annotated in
Hopkins Federal Equity Rules, 3rd Ed., pp.
162-4 (collating cases).

For all these reasons we respectfully submit the decree should be reversed, and one directed quieting plaintiff's title to his easements, compelling appellees to desist from destroying the easements or streets shown on the plat, to restore such streets to their former condition, and granting such other relief as is meet.

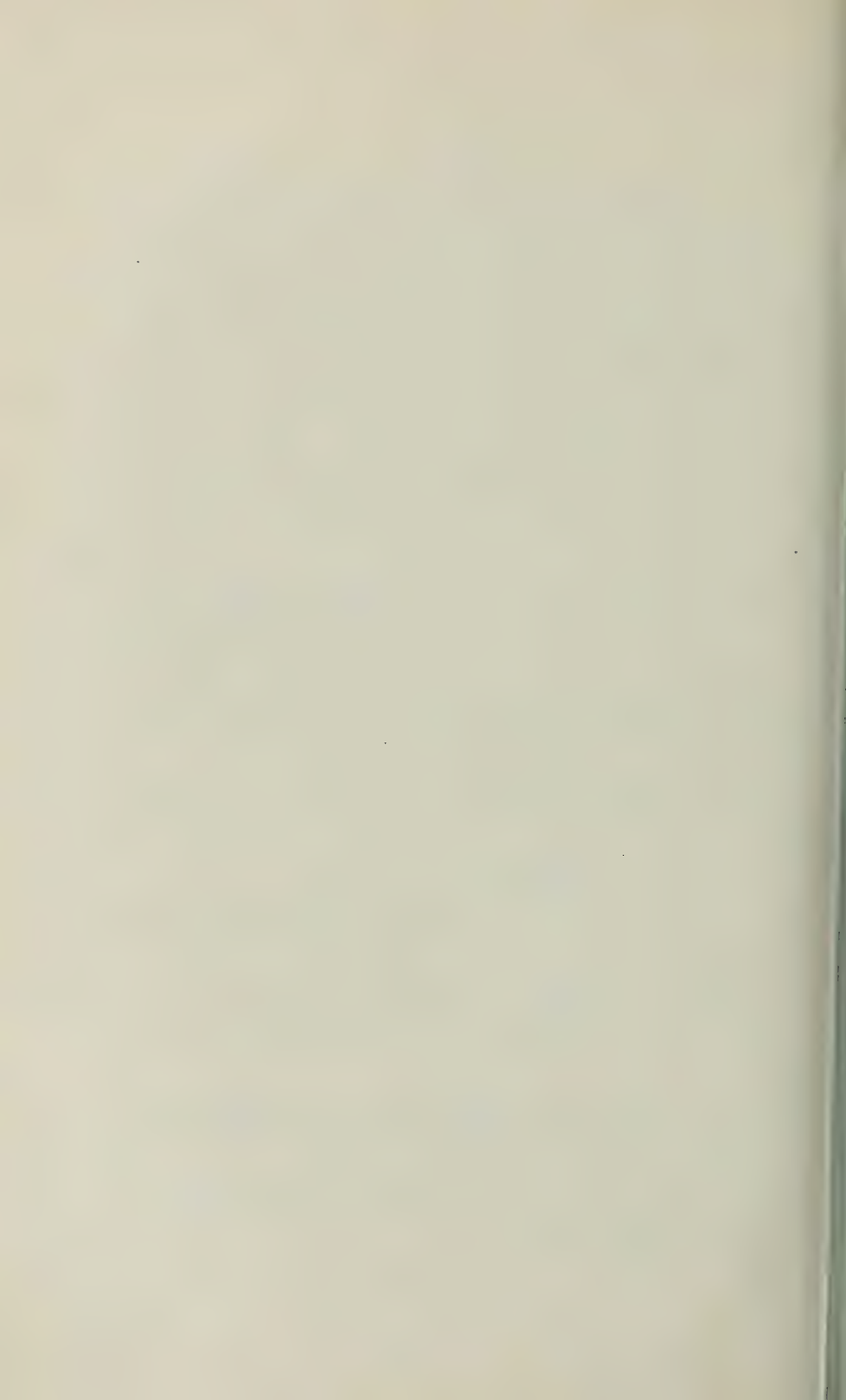
Respectfully submitted,

ISHAM N. SMITH,
418 Mohawk Bldg., Portland, Ore.,
Attorney for Appellant.

Service accepted at Portland, Ore., this.....
day of January, 1923.

.....
Attorney for Appellee City and its Officers.

.....
Attorney for Appellee School District and its
Officers.



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

12

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW, and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISEMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a Corporation,

Appellees.

BRIEF OF RESPONDENT, THE CITY OF PORTLAND

Upon Appeal from the United States District Court
for the District of Oregon.

FRANK S. GRANT,

H. M. TOMLINSON,

City Hall,

Portland, Oregon,

Attorneys for Respondent,

The City of Portland and Its Officers.

FILED

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F.B. MONTGOMERY

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No. 3962

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal
Corporation, et al.

Appellees.

BRIEF OF RESPONDENT, THE CITY OF
PORTLAND

STATEMENT OF FACTS

We wish to correct and supplement the appellant's statement of the case by referring to the following facts which appear in the record:

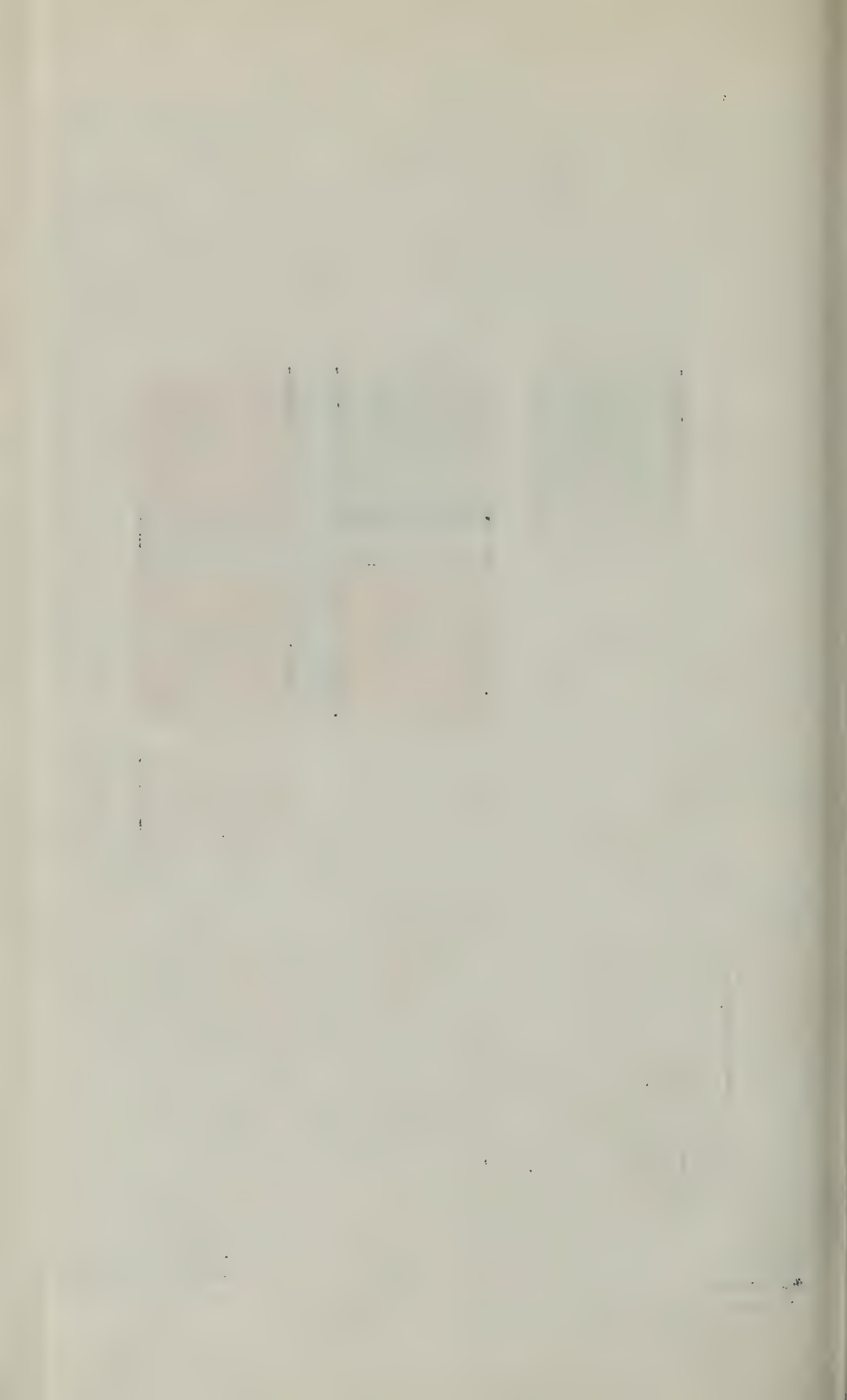
The Oregon Real Estate Company did not petition nor ask for the vacation of the street. The sole petitioner was School District No. 1 which comprises the whole of the City of Portland (Tr. pp. 45, 48.) The Oregon Real Estate Company merely signed the consent of abutting property owners which was attached to the petition in accordance with the procedure prescribed by law. (Tr. pp. 46, 49.)

None of the frontage of appellant's property has been cut off by the vacation proceedings. All of the

streets on the four sides of the block in which his property is situated still remain full width and unobstructed. His property can still be approached on full-width streets from the North, South, East, and West. He can go from his property on full-width streets to any other part of the city in as direct and short a way as he could before the vacation. All this will appear from a reference to the map on the opposite page, which is an enlargement of a section of the plat appearing in the complaint and in the abstract, with the ownerships indicated in colors. The effect of the proceedings on plaintiff is to prevent him from driving his automobile into the area marked blue on the map. In this respect he is affected in the same way as all other people in the city.

Referring to the statement on page 6 of Appellant's Brief to the effect that he spent money "in improving the streets of Holladay's Addition," there is no allegation of fact showing that he ever spent a cent to improve the portion of the streets affected by the vacation proceedings.

Contrary to the general tone and principal argument in appellant's brief, there are no facts concerning his deed nor the plat of Holladay's Addition which differentiate those documents from the ordinary deed and plat, or which give him any other or different rights in the streets of Holladay's Addition than the ordinary owner of a lot in a recorded plat. The dispute in this case is not between the appellant and the dedicator of the plat or the latter's successor; but the dispute is between the appellant on one side, and the City of Port-



land and School District No. 1, exercising governmental functions under authority of the state, on the other side.

There is no issue in this case on the point as to whether the streets in Holladay's Addition were really dedicated. We concede that all the streets in the plat were duly dedicated and that they were public streets and highways with all that those words connote. The majority of appellant's citations and arguments are therefore superfluous.

All that the defendant City has done in said proceedings is to relinquish its jurisdiction over the portion of the streets vacated, which, under the laws of Oregon, has now reverted to and is the property of the abutting owners. Appellant seeks, by a mandatory injunction, to compel the City to re-assume jurisdiction over the said portions of land, with the consequent burdens, liabilities and expense.

POINTS AND AUTHORITIES

Point 1.

Except as restricted by the constitution, the state's power is plenary in respect to the vacation of streets and highways within its borders, and this power may be delegated to a municipal corporation.

13 Ruling Case Law p. 67.

Dillon, Municipal Corporations (5th Ed.) sec. 1160.

McQuillin, Municipal Corporations, Sec. 1402.

Point 2.

The City of Portland has ample power to vacate streets both under the general laws of the state and under its own charter. It has had such power since the city was first incorporated in 1851, at first under the Territorial laws and later under the laws of the state.

Sec. 284, Charter, City of Portland, Compilation of 1914 that continues in effect as ordinances sections 362, 363, and 364 of the Charter of 1903. (Tr. pp. 27-32.)

Sections 3, 7, and subd. (12) of Section 34 of Charter, compilation 1914. (The foregoing appear on pages 23-32, Transcript.)

General Laws of Oregon, Session 1850, p. 262.

General Laws of Oregon, 1845-1864, Compiled by M. P. Deady, pp. 926-927.

Oregon Laws, Sec. 3824.

The Charter-ordinances above referred to (Secs. 362, 363, 364 Charter of 1903) have full statutory and charter power behind them. *Blue vs. Portland*, 77 Ore. 135.

Said Section 3824, O. L., reads as follows:

“VACATION OF LOT OR STREET IN INCORPORATED TOWN. In cases where any person interested in any corporated town in this state, the corporate functions of which shall be in active operation, may desire to vacate any street, alley, or common, or part thereof, it shall be lawful for such person to petition the common council or other body in like manner as persons interested in towns not incorporated are

authorized to petition the county court; and the same proceeding shall be had thereon before such common council or other corporate body having jurisdiction as authorized to be had before the county court, and such common council or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provisions of this act."

The method provided for vacation in unincorporated cities and towns referred to in Section 3824 includes the provision for consent set forth in Section 3823, which reads as follows:

"CONSENT OF ADJACENT OWNERS NECESSARY TO VACATION OF STREET. But no such vacation of a street or alley, or any part thereof, shall take place unless the consent of the person or persons owning the property immediately adjoining that part of said street or alley to be vacated be obtained thereto in writing, which consent shall be acknowledged before some officer authorized to take acknowledgment of deeds, and filed with the county clerk."

Point 3.

The law of the place where a contract is entered into at the time of making the same is as much a part of the contract as though it were expressed or referred to therein.

13 Corpus Juris 560.

Point 4.

In vacating a street the Council of the City of Portland acts judicially, and after notice and a hearing.

Merchant vs. Marshfield, 35 Ore. 55, 60-61.

Heiple vs. Clackamas County, 20 Ore. 147, 149.

Sections 362-364, Charter of 1903.

Oregon Laws, Sec. 3824.

Elliott on Roads and Streets (3rd Ed.) Sec. 1179.

Lincoln vs. Warren, 150 Mass. 309, 310.

Point 5.

The action of a municipal corporation in vacating a street is conclusive in the absence of an allegation showing fraud or gross abuse of power. Courts will not enquire into the motives, necessity, or expediency of such act. It is always presumed that the highway was vacated in the interest of the public and that its vacation was necessary for public reasons or purposes.

Enders vs. Friday, 78 Neb. 510, 513, 514; 15 Ann Cases, 685, 686.

Freeman vs. Centralia, 67 Wash. 142, 147; Ann. Cas. 1913 D, 786, 788.

13 Ruling Case Law, pp. 68, 69, 77.

Elliott on Roads and Streets (3rd Ed.) Secs. 1182, 1183.

McQuillin, Municipal Corporations, Sec. 1403.

State vs. Park Commissioners, 100 Minn. 150.

Tilly vs. Mitchell, etc. Co., 121 Wis. 1, 9-10, 12.

Heinrich vs. St. Louis, 125 Mo. 424, 427; 46 Am. St. Rep. 490, 491.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20.

Point 6.

A few authorities hold that the vacation of a street is not an injury to the abutting owners within the provisions of the constitution requiring compensation, and, in the absence of a statute making provision for damages, none can be recovered.

13 Ruling Case Law, p. 71.

Levee District vs. Farmer, 101 Cal. 178.

East St. Louis vs. O'Flynn, 119 Ill. 200.

Paul vs. Carver, 24 Pa. St. 207.

McGee's Appeal, 114 Pa. St. 470.

Barr vs. Oskaloosa, 45 Ia. 275.

Williams vs. Carey, 73 Ia. 194.

Hielscher vs. Minneapolis, 46 Minn. 529.

Fearing vs. Irwin, 55 N. Y. 486.

Note 26 L. R. A. 622.

Note 2 L. R. A. (N. S.) 269.

15 Ann. Cases 690.

McQuillin, Municipal Corporations, pp. 2992, 2993.

Dillon, Municipal Corporations (5th Ed.) p. 1839.

Point 7.

The general rule, however, is that persons *especially injured* by the vacation are entitled to recover such damages as they may sustain even in the absence of a statute providing therefor. *But to warrant a recovery*

it must appear that the complaining party has suffered some special damage differing in kind and not merely in degree from that sustained by the general public.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas.

1913 D, 786 with note p. 790.

13 Ruling Case Law p. 71, 73.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A.

(N. S.) 822, 828.

Hyde vs. Fall River, 189 Mass. 439; 2 L. R. A.

(N. S. 269 with annotated note.

Dillon, Municipal Corporations (5th Ed.) pp.

1840-1842.

McQuillin, Municipal Corporations, Sec. 1405.

Point 8.

The majority of decisions hold that owners of property that does not abut immediately upon the vacated portion of the street are not entitled to compensation, as their inconvenience or damage is not different in kind from that sustained by the general public.

Enders vs. Friday, 78 Neb. 510; 15 Ann. Cases

685, with annotated note p. 689.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas.

1913 D, with annotation p. 792.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A.

(N. S.) 822, 828.

German vs. Baltimore, 123 Md. 142; 52 L. R. A.

(N. S.) 889, with exhaustive annotations.

Dillon, Municipal Corporations (5th Ed.) p.

1842.

Elliott on Roads and Streets (3rd Ed.), Sec. 1181.

McQuillin, Municipal Corporations, p. 2995.

Point 9.

Other authorities hold that the property owners entitled to compensation include those, and only those, whose property abuts upon the street within the block in which the closed portion lies; that is, where the closed portion lies between the complainant's property and the next intersecting street.

Newark vs. Hatt (N. J.), 30 L. R. A. (N. S.) 637, 642.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20 at p. 40.

Elliott on Roads and Streets (3rd Ed.) 1181.

McQuillin, Municipal Corporations, Sec. 1410.

German vs. Baltimore, 123 Md. 142; 52 L. R. A. (N. S.) 889, with note citing numerous authorities.

Point 10.

Authorities are practically unanimous to the effect that a property owner is not *especially damaged* and cannot recover compensation unless his property either (a) abuts upon the closed portion of the street, or (b) lies between the closed portion and the next intersecting street leaving his property in a cul de sac, or (c), through some other state of facts, access to his property is cut off.

See note to Enders vs. Friday, 15 Ann. Cas. p 689.

it must appear that the complaining party has suffered some special damage differing in kind and not merely in degree from that sustained by the general public.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas.

1913 D, 786 with note p. 790.

13 Ruling Case Law p. 71, 73.

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See note to Enders vs. Friday, 15 Ann. Cas. p 689.

Meyer vs. Richmond, 172 U. S. 82.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas.
1913 D 786, with annotation p. 792.

Newark vs. Hatt, (N. J.) 30 L. R. A. (N. S.)
637, and annotated note.

13 Ruling Case Law, p. 71, 73.

Hyde vs. Fall River, 189 Mass. 439; 2 L. R. A.
(N. S.) 269 with annotated note.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A.
(N. S.) 822, 828.

Dillon, Municipal Corporations (5th Ed.), p.
1842.

McQuillin on Municipal Corporations, Sections
1405 to 1411 inclusive.

Elliott on Roads and Streets (3rd Ed.) Sec.
1180-1181.

Point 11.

A vacation which leaves undisturbed the highway in front of the abutter's premises and leaves him connection therefrom with the general system of streets is not an impairment of any vested rights and furnishes no ground for an action.

Cram vs. Lacona, 71 N. H. 51; 57 L. R. A.
282.

Note to Enders vs. Friday, 15 Ann. Cas. 689.

Note to Freeman vs. Centralia, Ann. Cas. 1913
D at p. 792.

13 Ruling Case Law, p. 73.

Newark vs. Hatt, (N. J.) 30 L. R. A. (N. S.)
637, with annotated note.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A.
(N. S.) 822, 828.

Elliott on Roads and Streets, (3rd Ed.) sec.
1181.

German vs. Baltimore, 123 Md. 142; 52 L. R. A.
(N. S.) 889, with notes.

Point 12.

The vacation of a street for school purposes or for public or *quasi* public buildings or grounds is a public purpose.

Note to Henderson vs. Lexington, 22 L. R. A.
(N. S.) 169.

Lewis, Eminent Domain, pp. 398, 399.

Meyer vs. Teutopolis, 131, Ill. 552.

Cherry vs. Rock Hill, 48 S. C. 553.

Polack vs. Orphan Asylum, 48 Cal. 490.

Reis vs. New York, 188 N. Y. 58.

Mottman vs. Olympia, 45 Wash. 361.

Point 13.

Even the fact that a street is vacated to enable a private corporation to use the land for a depot, or manufacturing plant, or other industry, does not preclude the vacation from being for a public purpose.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas.
1913 D, 786.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R.
A. (N. S.) 20, 36.

McQuillin Municipal Corporations, pp. 2988 to
2990.

Point 14.

The fact that upon the vacation of a street the land reverts to the abutting owner who may use it for his private purposes does not preclude the act of vacation from being for a public purpose.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D, 786.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20, 36.

McQuillin, Municipal Corporations, p. 2988.

Point 15.

The statute authorizes the Council of the City of Portland to vacate a street "if upon such hearing the council shall find that the public interest would not be prejudiced by the vacation of such street, or part thereof, and that the consent of the owners of the requisite number of front feet has been obtained." The findings of the Council on these matters is conclusive. The charter-ordinance provides that the finding of the Council as to whether the consent of the owners of the requisite number of front feet has been obtained "*shall be conclusive of the facts as found in all collateral proceedings, and shall be prima facie evidence of the facts in all direct proceedings.*"

Sec. 362, Charter of 1903, quoted in transcript page 30.

Transcript 49 to 57, findings of council.

ARGUMENT

Authorities are unanimous to the effect that the state may confer upon a municipal corporation authority to vacate streets. (See Point 1 this Brief.)

In 1870 and 1871 when Holladay's Addition was platted and also in 1908 when the appellant bought his property in that addition, the City of Portland had power, under a grant from the state, to vacate streets within the city. (See Point 2.)

That law became and is a part of appellant's deed as much so as if it were expressly set forth therein. (Point 3.) Certainly there was no warranty implied in the deed to the effect that the defendant, Oregon Real Estate Co., would resist, or withhold its consent from the governmental authorities when the public good required the vacation of a portion of a street, which portion was not immediately appurtenant to appellant's property and in which appellant had no interest different in kind from that of the general public.

While a few authorities hold that the effect of the vacation of a street upon abutting property is *damnum absque injuria* (Point 6), the general rule is that the owner of property *specially damaged* is entitled to compensation to the extent of such special damage (Point 7). Some of the authorities hold to that effect under a statute providing for such damages. Others hold so under constitutional provisions requiring compensation. But all agree that before recovery may be had such damage must be immediate and proximate, and different in

kind and not merely in degree from that sustained by the general public.

The authorities are practically unanimous to the effect that a property owner is not *specially damaged* and is not entitled to compensation unless his property either (a) abuts upon the closed portion of the street, or (b) lies between the closed portion and the next intersecting street and is left in a *cul de sac*, or (c), through some other peculiar state of facts access to the property is cut off (Points 8, 9, 10, and 11).

We have been unable to find a single case that goes so far as to hold that, where a street is vacated by public authority, a property owner may recover, who is affected in the manner that appellant is affected in the case at bar. His frontage is not cut off nor limited, and he has direct access to his property in five ways over public highways each of which is 60 feet wide. Three different highways extend their broadsides along the whole length and width of his property. The above cited cases hold that it is not enough that the property owner is prevented from travelling the vacated portion; it is not enough that he is required to travel in a more circuitous route; it is not enough that travel is diverted from the front of his property; and that these things affect him in greater degree than the rest of the public. There must be some direct, immediate, and proximate damage to his property that is special to him.

Authorities on the foregoing question are cited under Points 8 to 11 inclusive. We will refer to only a few of them here by way of illustration. The case of Cum-

gings Realty Co. vs. Deere, 208 Mo. 66 14 L. R. A. (N. S.) 822, was a suit in equity to restrain the use for private purposes of the vacated portion of a street. The court in holding that the complaint did not state a cause of action in that it failed to allege facts showing that the plaintiff was specially injured, said, among other things, as follows:

“Applying these rules as heretofore indicated, applicable to the subject of pleading, where an individual seeks to maintain an action concerning a public nuisance, we see no escape from the conclusion that the allegation in the petition of plaintiff in the case at bar is manifestly insufficient. The allegations in respect to the damages are embraced in these words: ‘The plaintiff’s property will be greatly damaged, and will also depreciate in value more especially than the general property in the city of St. Louis, being located on said Monroe street near to where the obstruction and permanent diverting is threatened to occur and be placed by the defendant.’ That allegation simply amounts to a statement, not that its property will be specially damaged, but that it will be damaged more than the general property in the city of St. Louis, and that is not a sufficient allegation under the rules of law, as has been announced by the courts of this state. As was said by Judge Ellison in *Thompson v. Macon*: ‘It may be that he suffered more than some others; but that will not alter the rule that, in order to entitle him to damages, he must have

sustained injury special to him and differing in kind from others.' ”

See numerous citation of authorities in that opinion.

Enders et al vs. Friday et al, 78 Neb. 510; 15 Ann. Cas. 685, is a suit in equity to enjoin the mayor and council of a city from passing an ordinance vacating a street for the purpose of allowing a railroad company to construct a depot. The complaint alleges that valuable church, school and other buildings have been erected on the street and that such vacation will incommode and endanger pupils attending school, that it will injure, inconvenience and discommode the people of the city, that the ground is not needed for depot purposes, that a large number of property owners have remonstrated against the vacation, and that the defendant does not intend to pay any damages on account of the vacation. The court held that the complaint did not state facts sufficient to constitute a cause of action and in its decision passed upon two points, first, the conclusiveness of the action of the city council as to the expediency of the vacation, and, second, as to whether or not property owners whose property does not abut upon the vacated part of the street are entitled to any damages.

Upon the first point the court said:

“By this section the city council is invested with discretionary powers relating to the opening, improving, or vacation of streets and alleys within the city limits, and as a general rule, where the proceedings are regular and fraud is not shown, the courts

are not authorized to interfere with such discretion. This court has gone to the extent of declaring that the action of a village board, under the provisions of the section above quoted, in vacating a street where, as in the case under consideration, the ordinance declares such vacation to be expedient and for the public good, and where all the provisions of the statute are observed, has all the force and effect of a judgment, and that only such irregularities as are jurisdictional in their nature will render the proceedings void. *Belevue v. Bellevue Imp. Co.* 65 Neb. 52, 90 N. W. 1002. It was further held in that case that even if the vacation proceedings are had at the instance and request and primarily for the benefit of certain owners whose property would be benefited by such vacation, this would not affect the validity of the proceedings; that the motive of the board in vacating a street or alley would not ordinarily be inquired into by the courts."

On the second point the court held in accordance with the general rule that where a part of a street is vacated only those property owners whose property abuts upon the vacated part of the street and who are thus cut off from access to their property are entitled to damages on account of such vacation. On pages 514-516 of the Nebraska report, and on page 687 of *Ann. Cas.*, the court, in a well-considered opinion upon this point, cites many authorities from various jurisdictions.

In a footnote to the case (15 *Ann. Cas.* 687, 689) is collated the most of the authorities bearing upon the

point that non-abutting property owners are not entitled to damages.

In *Glasgow v. St. Louis*, 107 Mo. 198, the court said:

“There is no doubt but a property owner has an easement in a street upon which property abuts which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. *Bailey v. Culver*, 84 Mo. 531.”

In the case of *Freeman, et al, v. City of Centralia, et al*, 67 Wash. 142; Ann. Cas. 1913-D 786, the plaintiffs were owners of property lying near but not abutting upon the part of a street proposed to be vacated who sought an injunction to restrain such vacation. The purpose of the vacation was to turn the land over to a railroad company to be used for railroad purposes.

The court passed upon two main points:

First, it held that citizens whose property does not abut on the vacated portion and whose access is not cut off, or who do not sustain special physical damages different in kind rather than in degree from that suffered by the public, are not entitled to compensation on the vacation of a street.

Second, it held that the fact that vacated streets may be put to private uses and that the vacation was instigated by private interests affected, does not warrant interference with the city council's action in vacating the street; the court not inquiring into the motive of the legislative action.

On the first of these propositions the court said:

"It is contended that appellants have a right to the use of the streets upon which their property abuts for its entire length, and are entitled to compensation as abutting owners, if any part of the street is vacated. Authority upon the particular proposition advanced is divided; but this court has, in several cases, aligned itself with the great majority of American courts in holding that a property owner does not come within the rule of compensation unless his property abuts upon or touches that part of the street which is actually vacated, or a special or peculiar damage is made to appear; or, to state the proposition in its elementary form, unless his injury differs in kind rather than in degree from that suffered by the general public."

The court then cited and quoted from numerous decisions to the same effect in its own and many other jurisdictions.

On the second of the foregoing points, the court said:

"It is more seriously contended that an injunction should issue because, by their demurrer, the defendants admit that they are 'conspiring and confederating' together with intent to turn over the

streets when vacated to a private use. It is a rule, sustained by universal authority, that courts will not inquire into the motives of a legislative body having power to act upon a given subject-matter. But granting that we had the right to do so, it does not follow that, because the property is to be put to purposes most convenient to the one acquiring title thereto, an injunction will issue. In the first place, having power to vacate, if the title in the street reverts to the abutting owner (*Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362), this court could not control or interfere with a lawful use of the property. Or, granting that the title does not revert but remains in the city, the mere fact that the result of a proper legislative act is to put the use of property in private control would not warrant interference by injunction."

The court then cited numerous authorities to the same effect.

On the point that non-abutting property owners are not entitled to damages or injunction, see the note to the foregoing case in *Ann. Cas.* 1913-D 790, 792.

In *Hyde vs. Fall River*, 189 Mass. 439; 2 *L. R. A. (N. S.)* 269, it was held owners of property abutting on a highway adjacent to a railroad track are not affected in a manner different from the public by a discontinuance of the street within the railroad right of way, and the erection of a bridge to carry the street over the railroad track. They are, however, entitled to damage for *change of grade* where the *statute* provides for it.

In *Newark vs. Hatt*, (N. J.) 30 L. R. A. (N. S.) 637, it was held that where the statute provides for damages, a property owner is entitled thereto upon the vacation of a part of the street upon which his land abuts which vacated part lies between his land and the intersecting street that bounds the block, thus shutting off his access from one direction and putting his property in a *cul de sac*. The court said, however, that, "except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it." This decision turns upon the question of fact as to whether there is an intervening cross street between his property and the part closed. See note appended to the foregoing case.

Contrary to the foregoing it has been held that "even under a *statute* authorizing a corporation to close a street, which provides that 'such company shall pay to the parties entitled to the same any and all damages that may accrue to them in consequence of the closing of any such highway, street, or alley,' it has been held that a party whose property was put in a *cul de sac* by reason of such closing of the street could not recover, since the damage was merely the same as that suffered by the general public and was therefore *damnum absque injuria*." Quoted from note 2 L. R. A. (N. S.) 270 which cites other authorities.

Even where a statute provides for damages for interests taken or damaged, it does not authorize the payment of damages to an owner of property which does not

abut upon any part of the street affected by the closing, and which is bounded by other streets.

Re West 151st Street, 123 N. Y. Supp. 343,

Cited in 30 L. R. A. (N. S.) 640.

In the Note, 2 L. R. A. (N. S.) 269, several cases are cited that hold that even where a statute provided for damages an owner left at the end of a *cul de sac* is not entitled to recover.

A property owner left in a *cul de sac* is not entitled to damages, where the portion closed was never opened, and the business portion of the city is in the opposite direction.

Ponischi vs. Hoquiam S. & D. Co., 41 Wash.

303, cited in 30 L. R. A. (N. S.) 638.

A party owning property in the next block is not entitled to damages. Reis vs. New York, 188 N. Y. 58; affirming 90 N. Y. S. 291, cited in 30 L. R. A. (N. S.) 639.

For exhaustive citation of authorities on the foregoing question see citations and references under Points 7, 8, 9, 10, and 11, in this Brief.

As to the necessity or expediency of the vacation, the action of the council is conclusive. Nor will the court enquire into the motive of the council. See authorities under Point 5.

Concerning the question of public purpose, we call the Court's attention to the fact that the statute (Tr. p. 30) does not require the vacation to be for a public purpose. It says: "If upon such hearing the council shall find that the public interest would not be preju-

diced by the vacation of such street, or part thereof, applied for, and that the consent of the owners of the requisite number of front feet has been obtained," the council may vacate the street. However, the record in this case shows that the purpose is for a public school building and grounds. (Tr. 15, 43, 44). That is a public purpose. See authorities under Point 12. If the council had in mind the fact that our city blocks are too small and the streets exist at too frequent intervals, and that the vacation of some would not only save the expense of maintenance, but would also facilitate traffic, that also is a public purpose.

Furthermore, it has been held by numerous authorities that it does not invalidate proceedings if the vacation is consummated as part of a plan to turn the property over to a private industry, or to a public or *quasi* public corporation to use for private, or *quasi* public, or public purposes. It has also been held that the proceedings are not vitiated even if an abutting owner is incidentally benefited by the vacation, if the main purpose is a public purpose. See authorities under Points 12, 13 and 14.

In *Columbus vs. Union Pacific R. Co.*, 137 Fed. 869, 874, the court said:

"It is urged, however, that the ordinance is void because it was not only a vacation, but a vacation and a grant, or sale. We concur in the conclusion, reached by the Circuit Court, that the provision, 'there shall be and is hereby granted,' etc., 'to the railroad company that portion of the street

vacated for depot purposes,' found in the ordinance, did not render the ordinance void."

In a much stronger case than the plaintiff's in the case at bar the Supreme Court of the U. S. in *Meyer vs. Richmond*, 172 U. S. 82 at 94 to 99, held that a permanent occupancy of the greater part of the street in front of his property by a railroad company was *damnum absque injuria*. The court cited numerous cases.

DISCUSSION OF PLAINTIFF'S THEORIES AND AUTHORITIES

The theories and authorities relied upon by the appellant are not applicable to the case at bar.

For instance the appellant, under Point 1 in his brief, and to a large extent under the other Points, cites numerous authorities to prove that if a lot or plat owner conveys a lot by reference to a map or plat that act dedicates as streets all of the streets marked on the map or plat, and thereafter he can not deny the dedication, nor revoke the same, nor take back to his private use any street so dedicated. There is no such issue in this case. The streets are conceded to have been lawfully dedicated and accepted from the time of the filing of the original plat, and no lot owner can appropriate them to his private use. But in this case the public authorities are acting under power granted by the state.

Aside from the superfluous citation of cases on that point, the appellant's authorities are either cases where a plat owner or his successor has endeavored to take back to his private use (without action on the part of

the public authorities) easements which he has conveyed to others, or cases where the vacation or obstruction interferes immediately and seriously with abutting owner's frontage or access to his property. They are not cases where the litigation is between the governmental body and an abutting owner whose property is in another block with an intersecting street between, and whose property is still accessible in five different ways and from four different directions, with a full width frontage on three sides of his property.

The theory that a private right of easement survives the vacation of a street extends merely to the right of access to one's property from the public highways. In other words a person who is not *pecially injured* by the vacation retains no private easement in the vacated part of a street after the public authorities have surrendered the public easement therein. This theory of the survival of a private easement is merely another way of saying that one's frontage or egress cannot be cut off without compensation. It merely means that the property owner to whom the vacated area reverts cannot obstruct the right of access of another abutting property owner who is *pecially damaged*, and not compensated. The mere right to travel that part of the highway is not a right that survives vacation.

This is shown by the authorities relied upon by the appellant. In *Sandstorm vs. O. W. R. & N. Co.*, 75 Ore. 159, 163, 164, the court said:

"For the invasion of the mere right to travel, as thus far stated, he is barred from recovery by the

municipal legislation mention; but, as he passed along the street with other members of the general public, he had a privilege which no other person possessed, to-wit, that of entering upon his close from that street,"

and further that:

"The great weight of authority, however, indicates that, where a street upon which the plaintiff's property abuts is so obstructed that he finds himself fronting upon a *cul-de-sac*, he is entitled to damage."

In that case the court held that the legislation of the city that authorized the railroad to obstruct the street effectually cut off plaintiff's right to travel the street but that he was entitled to damages for being left in a *cul-de-sac*.

So in the case of *Van Buren vs. Trumbull*, 92 Wash. 691, the aggrieved person owned property abutting upon the vacated portion of the street so that his frontage and egress were directly affected. The litigation was not between a private owner and the public corporation but between two quarreling lot owners, one of whom was trying to cut off the only means of access to the public highways which the other had. A plat had been dedicated and purchasers built homes therein. A general statute provided that any street that should remain unopened for five years would be automatically vacated. The court merely held that such vacation would not deprive an abutting owner of the right to get out of his own property onto a highway.

It may be conceded that the dedicator cannot recall any part of the plat but that is far from saying that the public authorities cannot vacate, subject to the right of abutters *specially* injured to recover damages.

In the case of Gormley vs. Clark, 134 U. S. 338, an owner of a town plat had sold numerous lots with reference thereto, and many years later fraudulently obtained from the village council (by leading them to believe he was the sole abutting owner), an ordinance vacating a part of Adams street cutting off the frontage and access to plaintiff's lots. The ordinance was written in the platter's own handwriting. Before the ordinance went into effect it was repealed by the council. It was held that the easement of the owner of lots, abutting on the portion of Adams street that was attempted to be vacated, still existed, and that Gormley, the original platter, should remove his obstructions therefrom. The injunction against the village and its authorities was dissolved, and no relief was granted against them. This decree protected only the abutting property.

In Central Trust Co. vs. Hennen, 90 Fed. 593, it appeared that petitioner's lot fronted upon a road in which she did not own the fee but had an easement by right of private contract. The county vacated the road along her entire frontage without making her a party. The railroad condemned the vacated road area without joining her as a defendant, and built an embankment in front of her premises 5 or 6 feet high, thus cutting off her frontage and her only egress and ingress. The court merely held that the lower court was in error in not

enquiring into petitioner's rights in the premises.

In *Stevenson vs. Lewis*, 244 Ill. 147, John Alexander Dowie had platted an addition in Zion City into lots with streets and public parks marked thereon. He sold none of the lots but executed over 1000 leases for a period of more than 1000 years, and, after many of the lessees had been in possession for many years, he executed and recorded an instrument purporting to vacate a park and many of the streets. Held this vacation was not lawful, that a man who dedicates a plat and leases lots for 1000 years with reference to the plat cannot thereafter revoke it.

In *Tooze vs. Willamette V. R. Co.*, 77 Ore. 157, the court merely held that an abutting owner whose access to his land is cut off by an obstruction placed in a public highway by a railroad company is specially damaged.

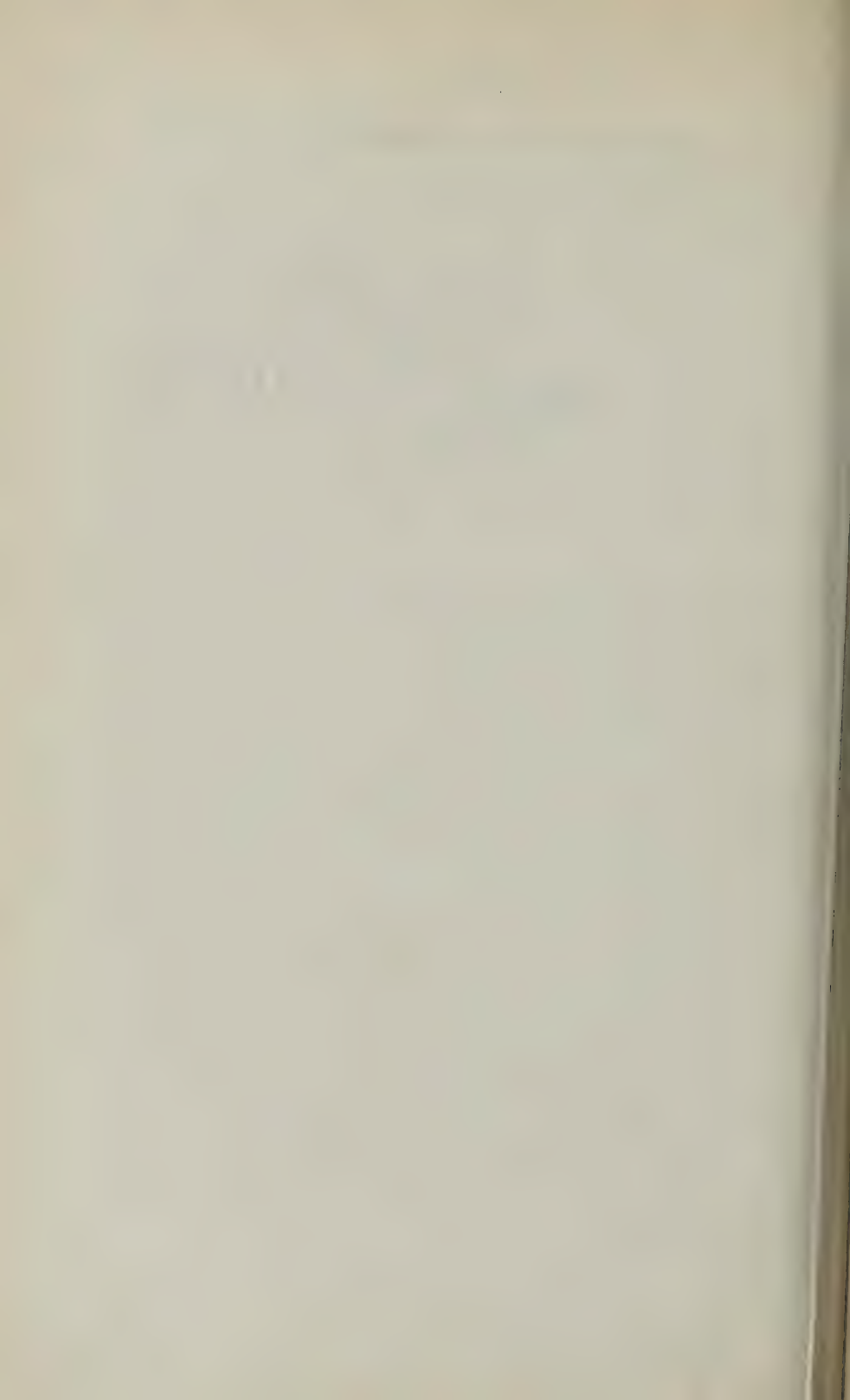
In *Bostwick vs. Hosier*, 97 Ore. 125, the court found that the vacation was for the private interest of one of the defendants "and not for any public purpose."

As to the point raised by appellant to the effect that the petition for the vacation of 8th Street did not have sufficient signers under the charter, it is sufficient for us to refer to the charter provision (Tr. p. 30) and to the petition (Tr. p. 44-46) and note that the charter says that the findings of the council on the matter of the sufficiency of the frontage represented "shall be conclusive of the facts as found in all collateral proceedings, and shall be prima facie evidence of the facts in all direct proceedings."

The decision of the lower court should be sustained.

Respectfully submitted,

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its officers.



United States Circuit Court of Appeals

For the Ninth District

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a CORPORATION,

Appellees.

Brief of School District No. 1 and Its Officers, Appellees

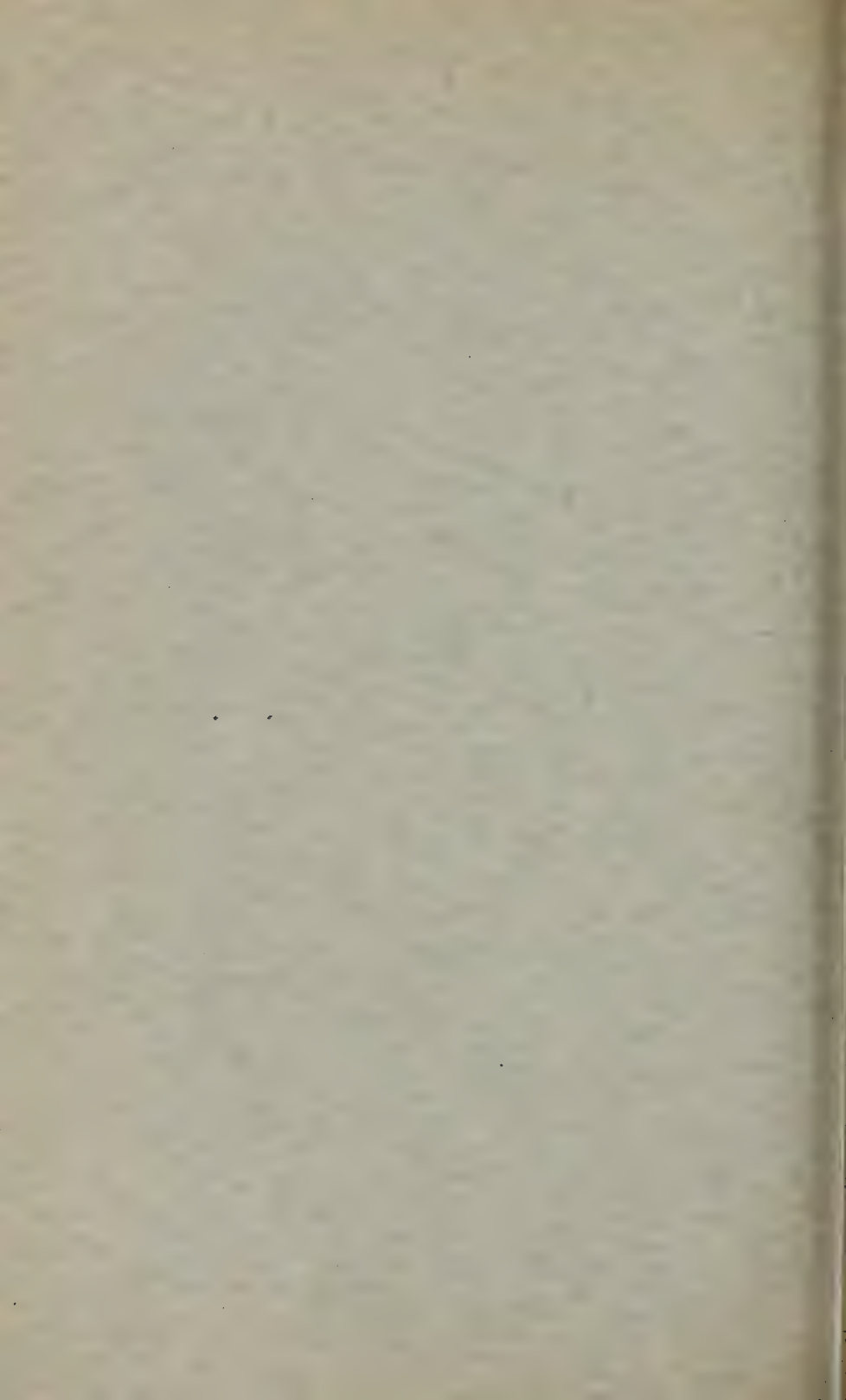
Upon Appeal from the United States District Court for the
District of Oregon.

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officers.

FILED

FEB 12 1923

F. D. MONCKTON,



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United States Circuit Court of Appeals

For the Ninth District

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a CORPORATION,

Appellees.

Brief of School District No. 1 and Its Officers, Appellees

STATEMENT OF FACTS

Supplementing the statement of facts found in the appellant's brief the appellees, School District No. 1 and its officers, desire to call the attention of the honorable court to the following additional facts:

Holladay Public School, one of the oldest schools of the district, was destroyed by fire in the Spring of 1922. It was located upon Block 77, Holladay Addition. This property is now occupied by the new administration building of the district. The district also owned Block 96, adjoining. The replacement of the school became a matter of immediate concern to the district and the purchase of Blocks 95, 97 and 98 was decided upon. In view of the size of the new school building (20 rooms) and the necessity for play ground for the children, the entire space represented by the four blocks and the intervening streets, 460 x 460 feet was deemed necessary. A price was agreed upon with the owner of the three blocks above mentioned, the Oregon Real Estate Company, and the district petitioned the city council to vacate the intervening streets. The Oregon Real Estate Company gave its written consent to the vacation and the city council vacated the streets by ordinance.

The purchase has been completed by the district and the plans for the school building are ready for bids.

The immediate vicinity of the proposed school site has not developed. The blocks purchased by the district are vacant and there are very few residences upon the adjoining blocks.

Point 1.

Although the proprietor, who files a plat as

provided by statute and sells lots therein with reference thereto, is held to have dedicated all streets to the public, which dedication is irrevocable by the act of the dedicator,

Section 3809, Oregon Laws,
 Christian vs. Eugene, 49 Or. 170,
 Schooling vs. Harrisburg, 42 Or. 497,
 Sandstrom vs. O-W etc. Co., 75 Or. 159,

he is not estopped from initiating proceedings for the vacation of lots or streets in the plat,

Section 3819, et seq. Oregon Laws

and the county or city authorities are authorized to order a vacation upon a proper petition, "if in their opinion justice requires it."

Section 3821 Oregon Laws.

Point 2

The effect of the proceedings vacating Eighth Street and Clackamas Street (exhibits "E" and "F," Transcript of record) was to protect the school district from the charge of maintaining a public nuisance and to protect it to the extent of the public right of easement in the street, but does not affect the damages to be assessed for the invasion of private rights, if any.

Sandstrom vs. O-W etc. Co., 75 Or. 159, 162.
 Willamette Iron Wks. vs. ORN Co. 26 Or. 232
 Kurtz vs. So. Pac. 80 Or. 213.

Point 3.

The great weight of authority is against the so-called "unit rule" contended for by the appellant. The prevailing rule is that the purchaser of a lot according to a plat acquires an easement only in such streets and alleys laid down on the plat as are necessary for the reasonable and convenient enjoyment of the lot conveyed.

Roberts vs Matthews, 137 Ala. 523, 34 So. 624
 Field vs Bartling, 149 Ill. 556, 37 N. E. 850
 Highbarger vs Milford, 71 Kans. 331, 80 Pac. 633
 Regan vs Boston Gas Lt. Co., 137 Mass. 37
 Diamond Match Co. vs Ontonagon, 72 Mich. 249, 40 N. W. 448
 Dodge vs Penn. R. R. Co., 43 N. J. Eq. 351
 Kerrigan vs Baccus, 69 App. Div. 329, 74 N. Y. Sup. 906
 Madden vs. Penn. R. R. Co., 21 Ohio C.C., 73
 State vs Hamilton, 109 Tenn. 276, 70 S. W. 619

Some cases hold that the purchaser acquires the right to have the street on which his property abuts kept open to the next connecting street in each direction and no further,

Canton Co. vs Baltimore, 106 Md. 69

Glasgow vs St. Louis, 107 Mo. 198, 17 S. W.
743
 Reis vs New York, 188 N. Y., 58, 80 N. E. 573
 Horton vs Williams, 99 Mass. 423, 428
 Pearson vs Allen, 151 Mass. 79
 Mayor of Baltimore vs. Frick, 82 Md. 77
 Highbarger vs Milford, 71 Kans. Sup. Ct.
 Rep. 331, 340
 City of East St. Louis vs O'Flynn, 206 Ill.
 200, 206

Point 4.

The "unit rule" has been applied in cases where courts have been called upon to preserve park spaces from the encroachments of dedicators.

19 C. J. (Easements) p. 935 and cases cited.

And the Oregon court has used language similar in kind in deciding cases relating to parks.

Carter vs Portland, 4 Or. 339
 Steele vs City of Portland, 23 Or. 176

Point 5.

But in defining the rights of a lot owner in a dedicated street which had been vacated by the municipal authorities, the Oregon court does not adhere to the unit rule as contended for by the appellant.

Sandstrom vs O-W etc. Co., 75 Or. 159, 164

Point 6.

It has been almost universally held that when the vacated part is beyond the next connecting highway from the plaintiff's property so that he has access in both directions, there is no damage or injury within the legal meaning of these terms.

Lewis Em. Dom. 3rd Ed. Sec. 207, and cases cited.

McQuillin Mun. Corpn. Vol. 3, Sec. 1409

Whitsett vs. Union Deposit Co. 10 Colo. 243, 249

East St. Louis vs O'Flynn, 119 Ill. 200, 10 N. E. 395

Henderson vs Lexington, 132 Ky. 390, 111 S. W. 318

Baudistel vs Mich. C. R. Co., 113 Mich. 687

Kimball vs Homan, 74 Mich. 699

Newart vs Hatt, 79 N. J. L. 548

Re Ruscomb Street, 30 Pa. Sup. Ct. 476

Brown vs San Francisco, 124 Calif. 274

Point 7.

Measured by this standard, the plaintiff in this suit has no claim which he can enforce either in equity or law. The latest expression of the Supreme Court of Oregon is to the effect that the plaintiff in order to show a cause of action or suit must show that the effect of the vacation has been to work some proximate, immediate, and substantial injury to the value of his real estate.

Sandstrom vs O-W etc. Co., 75 Or. 159, 167

ARGUMENT.

Point 1.

Nothing in the relationship of the Oregon Real Estate Co. with the appellant, Lockwood, incident to the sale and purchase of the appellant's property in Holladay Addition can be deemed to work an estoppel against the company. At the time that this sale and purchase was made the statute relating to the vacation of streets in incorporated towns, namely: section 3824, was in force, and had been in force since its adoption in 1864, together with a somewhat similar provision in the charter of the City of Portland. Section 3824 Oregon Laws, reads as follows:

“In cases where any person interested in any corporated town in this state, the corporate functions of which shall be in active operation, may desire to vacate any street, alley, or common, or part thereof, it shall be lawful for such person to petition the common council or other body in like manner as persons interested in towns not incorporated are authorized to petition the county court; and the same proceeding shall be had thereon before such common council or other corporate body having jurisdiction as authorized to be had before the county court, and such common council or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provision of this act.”

By the terms of this statute, which must be considered as entering into and being a part of the agreement for the purchase and sale of said property, it is stipulated that it shall be *lawful* for the owner of any portion of a plat to petition for a vacation of any street therein. In the present instance it should be further noted (plaintiff's Exhibits "C" and "D") that the Oregon Real Estate Co. was not the petitioner for this vacation, but merely gave its consent upon the petition of School District No. 1. It may also be noted that the Oregon Real Estate Co. was not a free agent in the sale of Blocks 95, 97 and 98 to the school district. It is true that the purchase was made by the school district with the understanding that the company would give its consent to the vacation of the streets in question, but the property would have been taken from the company by the district in any event. The district in acquiring property for school purposes may exercise the right of eminent domain. (Sec. 4983, Oregon Laws.)

"Sec. 4983: Whenever it may be necessary for any school district in this state to acquire any real property for school-house site, or other necessary school purposes, and the owner of said real property and the board of directors of said school district cannot agree upon the price to be paid therefor, and the damage for the taking thereof, if any, the district boundary board of the county in which such real property desired for school purposes lies, may and is hereby authorized,

upon the written request from the board of directors of such school district, to commence and prosecute in the circuit court for said county the same as other actions and suits are brought, in the name of such school district, any necessary or appropriate suit, action or proceeding for the condemnation of said real property so required for said purposes, and for the assessment of the value and the damage for the taking thereof, and the title acquired by any school district by any such suit, action or proceeding shall be a fee simple title; and the district attorney of the judicial district in which such property (to be) condemned lies, shall act as attorney for said district boundary board in all proceedings in the circuit court, as in other causes in which the state of county is a party or interested. The procedure in said suit, action or proceeding shall be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations or quasi-public corporations for public use or for corporate purposes."

The board of directors had proceeded according to this statute to this extent: It had determined that the property was necessary for school purposes, and had determined to acquire it for such purpose. Acting in accord with the statute, it had entered into negotiations with the owner and had been able to "agree upon the price to be paid therefor." This relieved the board of the necessity of condemning the property, but nevertheless the owner was under compulsion to part with his

property, either by contract or by judgment of the court, in view of the fact that the district had determined upon its acquisition. It may be further noted that the Oregon Real Estate Co. has not been partisan in this matter. It has not entered an appearance in this suit, indicating that it feels that the burden of acquiring this property for school purposes still remains with the school district.

The statutes of Oregon do not require that public necessity be shown before county or municipal authorities may vacate a street. Section 3821 Oregon Laws, provides that such authority may, *if in their opinion justice require it*, grant the prayer of the petitioner in whole or in part. However, in any event, the vacation of the streets in question was for a public purpose.

“The abolition of grade crossings, the construction or improvement of railroad depots and terminals, and the re-arrangement of streets to secure a more regular and harmonious system, are public purposes for which the power of vacation may properly be exercised. So where the vacation is for public or quasi-public buildings or grounds. Lewis Eminent Domain (3rd Ed.) Sec. 209, page 398.”

Point 2.

The Oregon courts recognize that the owner of property which is actually damaged by the vacation of the street on which it abuts may have

his remedy. Mr. Justice Burnett, in the case of *Sandstrom vs. O-W etc. Co.*, 75 Or. 159, at page 162, says:

“It was established, as stated in the answer, that the public authorities had given permission for the construction of the railway. The effect of this is thus stated in 1 Lewis, *Eminent Domain* (3 ed.), Section 169, page 304:

“‘Authority to occupy a street, whether obtained directly from the legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street and leaves the company to deal with private rights as in other cases.’ *Muhler v New York & Harlem R. R. Co.*, 197 U. S. 544 (49 L. Ed. 872, 25 Sup. Ct. Rep. 522).

“In other words, the sanction of local authorities exonerates the company from the charge of maintaining a public nuisance, but does not affect the damages to be assessed for the invasion of private rights.”

But in the same opinion the court holds that the vacation must work some “proximate, immediate and substantial injury to the value of the real estate”. To the same effect is *Willamette Iron Works vs. O. R. N. Co.*, 26 Or. 232, *Kurtz vs. So. Pac.* 80 Or. 213.

Point 3.

The appellant’s chief reliance is upon the so-called “unit rule” whereby he asserts an easement

over every thoroughfare and street shown in the plat, whether such thoroughfares and streets are, or are not, necessary or convenient for ingress to or egress from his property.

This rule is not the law in Oregon and is declared by all text writers to be the view only of a small minority of the courts of the land.

“When land is sold by reference to a plat upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the street or way upon which his lot is situated and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in any street or way which his land does not touch and which does not lead to a highway; and he is not entitled to an injunction or other remedy by reason of the obstruction of such street or way”. Jones on Easements, Sec. 347, and cases cited.

“In some jurisdictions, upon the principle that the map or plat is a unity, and that the purchaser of a lot buys on the implied condition and understanding that all the streets and ways shown thereon will be available for public use and not merely the street upon which his property abuts, it is held that the purchaser of a lot acquires a right or easement in *all the streets and alleys* shown on the plat or map, and can insist that all these streets and alleys shall be kept open and devoted to public use. Hence, when such a plat has been made and lots have

been sold with reference thereto, the owner of the land by whom the plat was made cannot, without the consent of each and all of his purchasers or their grantees, vacate a part of the streets dedicated. But this construction of the effect of a sale of property according to a map or plan prepared by the owner is rejected in some jurisdictions, and it is held that the purchaser of lots is only entitled to have that portion of the street which borders his premises kept open at both ends. This does not mean, however, that the purchaser is entitled to have the street kept open at each end no matter how remote the ends are from his property. The condition is complied with if there is access to a *cross street in each direction*. This construction is reached upon the ground that in the absence of an express grant, a grant by implication of an onerous servitude upon the land of grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties." Dillon, *Municipal Corporations*, 5th Ed. Sec. 1084.

"According to some authorities, such purchaser under the plat acquires the right to have all the streets and alleys laid down on the plat kept open and to that extent has a private right in each and all of the streets and alleys in the subdivision. But the prevailing rule is that the purchaser of a lot according to a plat acquires an easement only in such streets and alleys laid down on the plat as are necessary for the reasonable and convenient enjoyment of the lot conveyed. This rule fixes no precise limit to the private

rights acquired but the reasonable application of the rule would include such streets and parts of streets as give value to the lot and the loss of which would render the lot less valuable to use or sell. The grant, according to well recognized principles, should be construed in favor of the purchaser and he should be held to acquire all that is fairly necessary for the enjoyment of the property conveyed. Some cases hold that the purchaser acquires the right to have the street which his property abuts kept open to the next connecting street in each direction and no further." Lewis Eminent Domain, (3rd Ed.,) Sec. 198, and cases cited.

Many decisions of the Massachusetts court sustain the conclusion of the text writers.

Holmes J. in *Pearson vs. Allen*, 151 Mass. 79, says:

"The only question worthy of discussion is whether the private rights of way, if any, to which the plaintiff is entitled by reason of the reference to the plan in her deeds extend to Center Avenue. We are of the opinion on the whole that they do not. The cases here and elsewhere show that there are limits to the easements raised by way of implication even if there are not limits to the power of creating easements when it is attempted by express words. A reference to a plan like this, laying out a large tract, does not give every purchaser of a lot a right of way over every street laid down upon it."

In the case of *Horton vs. Williams*, 99 Mass. 423, 428, the court said:

“It can hardly be said that the easement acquired by such a conveyance is a mere right of way in the street frontage only. What is acquired is a right of ingress and egress and such access as the plat and dedication provide. * a right of way in the streets upon which the lot abuts. It is not a license merely but an easement appurtenant to and running with the land. It does not arise alone from the necessities of the grantee and lie by implication, but rests in express grant, evidenced by the conveyance referring to the plat.”

In *Regan vs. Boston Gas Light Co.* 137 Mass. 37, 42, the court said:

“This deed conveyed to Foster the fourth lots owned by plaintiff, bounded on Union Street, Neponset Street, and Commercial Street, ‘also the streets for public highways, as by a plan recorded in register’s office for benefit of all concerned, drawn by Mather Withington.’ This deed cannot be construed as an express grant of rights of way over all the streets shown on the plan, the words ‘the streets for public highways’ clearly referring to the streets before named in the deed. Can it fairly be construed as a grant by implication of such rights?

“What is the purpose and effect of a reference to a plan in a deed, is a question of the intention of the parties. In the absence of an express grant, a grant by

implication of an onerous servitude upon other land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless such is clearly the intention of the parties."

In *Hawley vs. Baltimore*, 33 Md. 270, which is the leading case in Maryland upon this subject, it is said:

"The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets he thereby dedicates the streets so laid out to public use. The rule is founded on the doctrine of implied covenants and the dedication will be held to be co-extensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. In the case before us the right of way or easement in Mosher street acquired by the purchasers of the lots mentioned in the proof is the precise limit of the dedication by Hiss. Over what portion of Mosher street then did their right of way exist? We think they acquired by their several purchases the right of way only from Madison avenue to McCulloh street, as it is between those streets that their lots lie and bind on Mosher. The doctrine of implied covenants will not be held to create a right of way over all of the lands of the vendor which may lie, however remote, in the bed of a street. The lands must be con-

tiguous to the lot sold and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed and no further."

In the case of *Baltimore vs. Frick*, 82 Md. 77, the same rule was applied by the court as follows:

"If in a deed conveying land it is described as fronting or binding on an unopened street, owned by the grantor, which street is designated on a public map or private map, such description generally operates as a dedication of the street. The purchaser is entitled to a right of way over it to its full dimensions only until it reaches some other street or public way and the street which limits the dedication is the next existing public street, whether the same be actually used as such or not."

The rule laid down by the Supreme Court of Michigan is contained in the decision of the case of *Diamond Match Co. vs. Ontonagon*, 72 Mich. 249, 259, as follows:

"As between individuals so purchasing and the proprietor, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property purchased by them kept open

for their own and the public's use. But such proprietor is not estopped from reclaiming or shutting up any street or portion thereof delineated on his map where private rights are not directly affected."

In *Thorpe v. Clanton*, 10 Ariz. 94, 85 Pac. Rep. 1061, the Supreme Court of Arizona rejected the view that a person purchasing lots according to plat acquired an interest in all the streets shown on the plat, and held that where a part of the streets were fenced in and closed, such purchasers could not compel the opening of the streets without showing that their property was specially damaged. See also, *Bell v. Todd*, 51 Mich. 21; *State v. Hamilton*, 109 Tenn. 276, *Jackson vs. Birmingham Foundry and Machine Co.* 154 Ala. 464, 45 So. Rep. 660.

It will be noted that in many of the cases above cited, the courts base their decision upon the ground that in the absence of an express grant, a grant by implication of an onerous servitude upon the land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties.

The Supreme Court of Kansas rejects the "unit rule" in the case of *Highbarger vs. Milford*, 71 Kans. Sup. Ct. Rep., 331, 340, where it was said:

"While we do not think that when one purchases a parcel of ground bounded by a laid-out and dedicated street, in a given

platted parcel of land, he thereby necessarily becomes vested for all time with the right to travel over and along all of the streets and alleys of such platted parcel of ground, or over all the streets that it would be convenient for him to use, we do think that he obtains the right to the use of such streets as are reasonably necessary for the enjoyment of the land so purchased by him. These streets are ordinarily such as bound the block in which his land is situated, or such as furnish access to his property from either direction, and there is no reason to limit this ordinary rule in this case."

In the case of *City of East St. Louis vs. O'Flynn*, 206 Ill. Rep., 200, 206, it was said:

"Here, plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street front of the alley in the rear of his property remains open as before, according the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the '*same kind*' of damage that would be sustained by all other persons in the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action. The court very properly instructed the jury, for defendant, 'that, for

the vacation mentioned in that ordinance, the defendant is not liable to plaintiff for any consequential damage that may have resulted to his lot therefrom, and defendant is not liable, in this action, for anything alleged in the declaration in this case done by the St. Louis and Cairo Railroad Company, which company was not authorized to do by said ordinance'."

Points 4 and 5.

The appellant has contended that the unit rule has been adopted by the courts of Oregon and cites *Steele vs. City of Portland*, 23 Or. 176, and *Carter vs. Portland*, 4 Or. 339, both of which are cases in which the court was called upon to preserve park spaces from the encroachments of the dedicators. Strong language has been used by the courts of various jurisdictions under similar circumstances. 19 C. J. 935, and cases there cited.

However, in construing the rights of a lot owner in a platted district, the Supreme Court of Oregon, in the case of *Sandstrom, vs. O-W etc. Co.*, 75 Or. 159 at 163, lays down the following rule:

"Having purchased the property with reference to the dedicated streets appearing on the plat, the plaintiff was entitled to the use of those highways as an appurtenance to his premises. In common with the general public residing in other parts of the city or state, he had a right to travel along Newark street without let or hinderance. For the invasion of the mere

right to travel, as thus far stated, he is barred from recovery by the municipal legislation mentioned; but, as he passed along the street with other members of the general public, he had a privilege which no other person possessed, to-wit: that of entering upon his close from that street, and prior to the construction of the road, in the exercise of his prerogative, he could approach his premises from the east as well as from the west. The defendant is in the position of saying to him in substance:

“ ‘Although you had the right, before we came upon the ground, to go to your residence both from the east and from the west along Newark street, yet in our judgment it is enough for you if you can reach it from the west, and we will therefore appropriate your eastern approach for ourselves.’

“There is a palpable invasion of the plaintiff’s right of access to and egress from his premises. If it is found in principle to allow this without compensation in damages, the company could as well take from him both approaches. The complaint discloses that the plaintiff has suffered an injury not common to the general public but peculiar to himself, whereby he has been deprived of part of his convenient method of access to and egress from his realty.”

This expression of the Supreme Court, which is a clear, concise and comprehensive definition of the rights of a lot owner in a platted district, does not contain the chief element of the unit

rule as contended for by the appellant, and is decisive of the case at issue. The rights of the lot owner by this definition do not include an easement private in nature over every thoroughfare and street shown upon the plat, but is limited to those immediately surrounding or convenient for approach to his property.

Point 6.

The vacated streets lie beyond the first intersection and in the next block from the appellant's property. The street on which the appellant's lots front will remain open from end to end. No obstruction is threatened to any of the frontage on the entire block in which they are situated. One of the streets vacated lies more than two hundred feet from the appellant's property, and the other is across the intersection. The authorities are unanimous that in situations of this kind the lot owner suffers no damage or injury within the legal meaning of these terms.

“When the vacated part is beyond the next connecting highway from the plaintiff's property so that he has access in both directions, it is held by all the authorities that there is no taking of the plaintiff's property, though the closing of the street at the point in question renders his property less valuable.” Lewis Eminent Domain, (3rd Ed.) Section 207, and cases cited.

Many of the decisions above quoted hold to this rule, and others could be collected without number.

“There is no doubt but a property-owner has an easement in a street upon which his property abuts, which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief.” *Bailey v Culver*, 84 Mo. 531.

In *Reis vs. New York*, 188 N. Y. 58, 68, it was said that the vacation of a part of a street has been to give no rights to a property owner on the street in another block, there being cross streets on both ends of his block, and it was said:

“While the city may not close the street so as to prevent access to the plaintiff’s premises, without a trespass, it is enough if access to the plaintiff’s lot is preserved although such access may not be quite so convenient as it would be if the street were allowed to remain open.”

Measured by the standard laid down in these cases, the appellant has no claim which he can enforce either in equity or at law. The only in-

jury which he has sustained is one which he suffers in common with the rest of the traveling public.

It is said by the court in *Sandstrom vs. O-W etc. Co.*, *supra*, (page 163):

“The principle indeed, is well established that, for an injury which an individual sustains in common with the general public, he cannot complain, although he may suffer more acutely than the rest of the people. In such cases he must find his relief, if at all, at the hands of the state by public prosecution.”

The equities claimed by the appellant are obscure and doubtful. Ostensibly he is concerned about the closing of the streets in question. Viewing the result of the closing it may be questioned that he is entirely frank in his contention. Holladay Addition is a residential district, with blocks two hundred feet in length. Obviously no great inconvenience would be suffered by the lot owners if the blocks were three times as long. The result of the closing of the streets in question is to create a block four hundred and sixty feet long, not an excessive length in a residential district.

The property in question has been acquired by the school district for the erection of a twenty room, modern school building to accommodate a large enrollment of pupils. It is to replace a building which was burned a year ago. A single block could scarcely accommodate the building,

leaving no space for play ground. The necessity for larger school grounds to keep the children off the streets and away from traffic has been recognized by the district which is adhering to the rule that no new building shall be erected on lots which do not furnish adequate play space. It may be fair to assume that the motive of the plaintiff in this suit is found in paragraph VI of the appellant's supplemental complaint. (Abstract of record, p. 81.) He does not want the school located at this point. Paragraph VI reads as follows:

“That the defendant School District threaten to use all of the vacated portion of said streets for school purposes and to erect and construct and maintain on the property acquired by it from the defendant Oregon Real Estate Company a public school building or buildings and playgrounds, and by the maintenance of such public school building and playgrounds and the devotion of said property so acquired by said School District from the Oregon Real Estate Company, the property (68) of this plaintiff heretofore described herein will be greatly depreciated in its value, in its marketability, and in its salability, to plaintiff's damage, and the damage so inflicted upon plaintiff's property is peculiar and personal to himself and his property, and it is a damage of a different kind to that suffered by the general public by the erection and construction of said school buildings and by the appropriation of said property for schoolhouse purposes and school playground purposes as aforesaid.”

The use of the property for the establishment of a school is a public use and the appellant has shown no authorities which would indicate that he is entitled to damages for the location of the school in his neighborhood. It might be further suggested that it is to the appellant's actual advantage that the streets be vacated and the school be located on the larger tract rather than upon a single block fronting his property. With the larger area the building will be placed at a greater distance from the property of the appellant, and the noise created by the children at play centralized at a point further removed from his premises.

For these reasons we respectfully submit that the decree of the lower court should be affirmed.

Respectfully submitted,

STANLEY MYERS, District Attorney,

SAM'L H. PIERCE, Deputy District Attorney,

Attorneys for School District No. 1, and
its officers, Appellees.

No. 3243

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARINE HARDWARE COMPANY, a Corporation, Libelant,
Appellant,

vs.

HALFHILL PACKING CORPORATION, a Corporation,
Claimant of the GASOLINE LAUNCH "MOUNTAINEER," Her Tackle, Apparel and Furniture,
MITCHELL MARINCOVICH, PAUL BOGDANICH
and AUGUST FELANDO, Doing Business Under the
Firm Name and Style of SAN PEDRO GROCERY and
MEAT MARKET, and BABASA BROTHERS COMPANY, a Corporation, Libelants in Intervention,
Appellees,

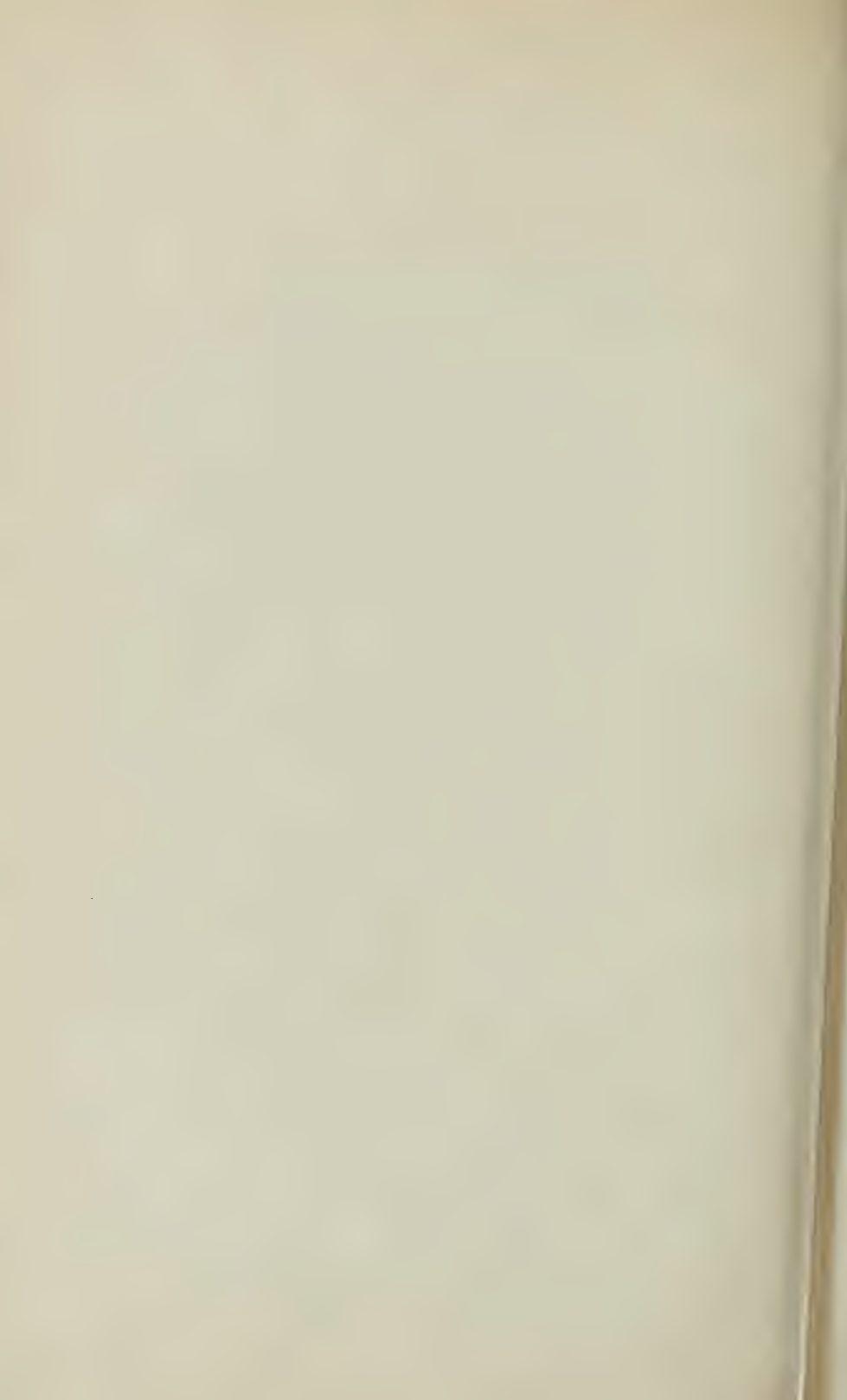
Apostles on Appeal.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

FILED

DEC 29 1922

F. D. MONCKTON,
CLERK



No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

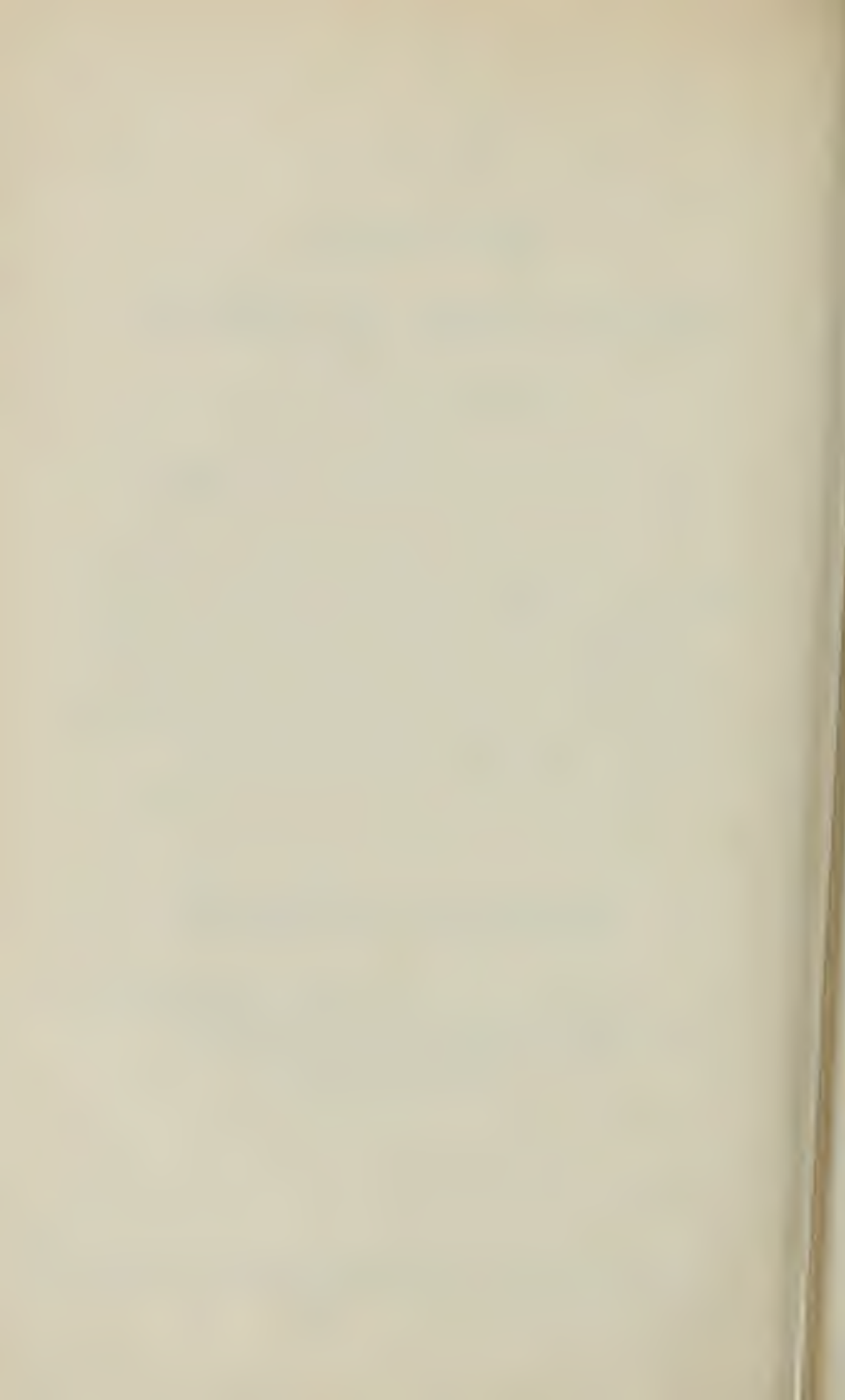
MARINE HARDWARE COMPANY, a Corporation, Libelant,
Appellant,

vs.

HALFHILL PACKING CORPORATION, a Corporation,
Claimant of the GASOLINE LAUNCH "MOUNTAINEER," Her Tackle, Apparel and Furniture,
MITCHELL MARINCOVICH, PAUL BOGDANICH
and AUGUST FELANDO, Doing Business Under the
Firm Name and Style of SAN PEDRO GROCERY and
MEAT MARKET, and BABASA BROTHERS COMPANY, a Corporation, Libelants in Intervention,
Appellees,

Apostles on Appeal.

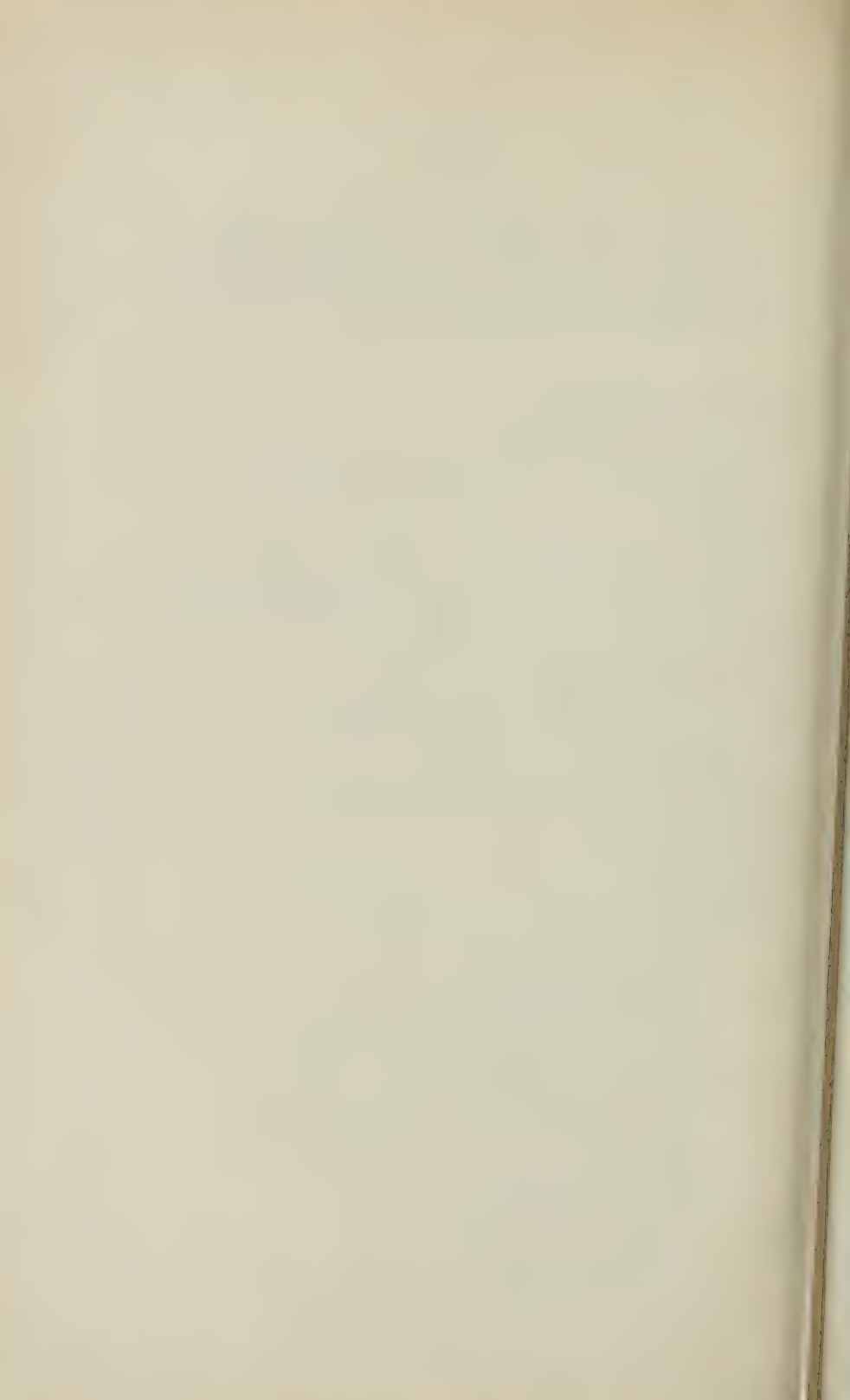
Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys:

For Appellants:

LOUCKS & PHISTER, Esqs., Marine Bank
Bldg., San Pedro, California.

For Appellees:

OVERTON, LYMAN & PLUMB, Esqs.,
L. K. VERMILLE, Esq., Stock Exchange Build-
ing, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN DIVI-
SION, IN ADMIRALTY.

MARINE HARDWARE COMPANY,	:	
a corporation,	:	
	Libellant,	:
	vs.	:
GASOLINE LAUNCH "MOUN-	:	LIBEL
TAINER"	:	
	Respondent.	:

Comes now the Marine Hardware Company, a corporation, by way of libel against the Gasoline Launch "Mountaineer," her tackle, apparel, furniture, engines, etc., and against all persons having an interest in said Gasoline Launch "Mountaineer," complains as follows:

I.

That the Libellant is and was at all times herein mentioned, a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at and within the City and County of Los Angeles, State of California as a Ship Chandler.

II.

That the said Gasoline Launch "Mountaineer" is a domestic vessel, and now is owned and at all times herein mentioned was owned by some person or persons who are residents of the State of California, but who are to the libellant unknown, and who, as libellant is informed and believes, reside in the City of Los Angeles, State of California.

III.

That while said Gasoline Launch "Mountaineer" was in the Port of San Pedro, City of Los Angeles, District aforesaid, between the 12th day of May, 1920, and the 16th day of July, 1921, both dates inclusive, the libellant furnished materials and stores as a Ship Chandler, an itemized account of which is hereunto annexed and marked "Exhibit A," towards the equipping and furnishing of said Gasoline Launch "Mountaineer" at the request of the Master thereof, and at the prices in said schedule mentioned; that the charges in said account are just and reasonable, and the materials furnished were necessary and proper to equip said Launch to perform her intended voyage or voyages, and were furnished on the credit of said Gasoline Launch "Mountaineer."

IV.

That the materials so furnished have gone into the said Launch and have become a part thereof, and that the same amount to and are of the value of Six thousand, seven hundred and eighty-six and 14/100 dollars (\$6786.14); that the said sum has not, nor has any part thereof, been paid, except the sum of Two thousand dollars (\$2000.00), and there *no* remains wholly due, owing and unpaid to this libellant the sum of Four thousand, seven hundred and eighty-six and 14/100 dollars (\$4786.14).

V.

That all and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the

1	" Tuna Red	6.00	
2	Qts. " "	3.30	17.30
<hr/>			
17	2 Coils 3"—3 Ply. Purse Bine		
	247—252# @ .32½	162.18	
4	Coils 12 th. Manila 202# @		
	.29	58.58	220.76
<hr/>			
28	4 Fig 8 Links @ .75	3.00	
	5 Long " @ .20	1.00	
	3 Doz. 1¼" Galv. Rings @ .40	1.20	
	2—6' Sing. Pat. Blocks 1.50		
	Plus 20%	3.60	
	2# 7 Sing. Galv. Eye Blocks		
	@ .25	.50	
	1 Vise	6.50	15.80
<hr/>			
28	By 1 Vise Credit		6.50
<hr/>			
			6736.59
Less Credit			6.50
<hr/>			
Forward			6730.09

[Endorsed]: ORIGINAL No. 1027 Civ DEPT.—
 IN THE DISTRICT COURT OF THE UNITED
 STATES, IN THE SOUTHERN DISTRICT OF
 CALIFORNIA SOUTHERN DIVISION IN AD-
 MIRALTY. MARINE HARDWARE COMPANY,
 a corporation, Libellant, VS. GASOLINE LAUNCH
 "MOUNTAINEER, Respondent. LIBEL. Received
 copy of the within Libel, this day of September, 1921.
 Proctors for FILED SEP 28 1921 CHAS. N.

WILLIAMS, Clerk By R S Zimmerman Deputy Clerk. Law offices LOUCKS AND PHISTER 10 Wall St. San Pedro, Calif. Telephone 1065

Southern District of California, ss.

The President of the United States of America:

To the Marshal of the United States for the Southern District of California, Greeting:

WHEREAS, a libel in rem hath been filed in (Seal) the District Court of the United States for the Southern District of California, on the 28th day of September, in the year of our Lord one thousand nine hundred and twenty-one, by Marine Hardware Company, a corporation, against the Gasoline Launch "*Mountaineer*," her tackle, apparel, furniture, engines, etc., and against all persons having an interest in said Gasoline Launch, in a cause of contract, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Gasoline Launch or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Gasoline Launch or vessel, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You are therefore hereby Commanded to attach the said Gasoline Launch or vessel, her tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due no-

tice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of California, on the 17th day of October, A. D. 1921, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Honorable BENJAMIN F. BLEDSOE, Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 28th day of September, in the year of our Lord one thousand nine hundred and twenty-one, and of our independence the one hundred and forty sixth.

Chas. N. Williams, *Clerk.*

By R S Zimmerman

Messrs. Loucks and Phister

Proctor for Libellant.

In obedience to the within Monition, I attached the Gasoline Launch "Mountaineer" therein described, on the 1st day of October, 1921, and have given due notice to all persons claiming the same, that this Court will, on the 17th day of October, 1921 (If that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated October 1st, 1921

C. T. WALTON, *U. S. Marshal.*

By A. S. Menick, *Deputy.*

Marshal's Civil Docket No. 4449 No. 1027 Civil
 U. S. District Court SOUTHERN DISTRICT OF
 CALIFORNIA SOUTHERN DIVISION Marine
 Hardware Co., a corporation, *vs.* Gasoline Launch
 "Mountaineer," etc. *Monition returnable* Oct. 17, 1921
 Messrs. Loucks and Phister Proctor for Libellant.
Issued Sep 28 1921 *Filed*.....19... Chas. N.
 Williams, Clerk. FILED OCT 21 1921 Chas. N.
 Williams, Clerk. By Edmund L. Smith, Deputy Clerk.
 Eq. Rule Br 497

IN THE DISTRICT COURT OF THE UNITED
 STATES, IN AND FOR THE SOUTHERN
 DISTRICT OF CALIFORNIA,
 SOUTHERN DIVISION.

)	
MARINE HARDWARE COM-	:		
PANY, a corporation,	:		
Libellant,	:	LIBEL IN	
- vs -	:	INTERVENTION	
	:	OF THE	
GASOLINE LAUNCH	:	HALFHILL	
"MOUNTAINEER"	:	PACKING	
Respondent,	:	CORPORATION,	
	:	a corporation.	
HALFHILL PACKING COR-	:		
PORATION, a corporation,	:		
Intervener.	:		
)	

TO THE HONORABLE DISTRICT COURT OF
 THE UNITED STATES IN AND FOR THE
 SOUTHERN DISTRICT OF CALIFORNIA,
 SOUTHERN DIVISION:

The libel in intervention of the Halfhill Packing
 Corporation, a California corporation, against the

launch Mountaineer, her tackle, apparel, and furniture and against all persons intervening for their interest, and in answer to the libel of the Marine Hardware Company, leave of court having been first obtained to file its libel in intervention alleges as follows:

I.

That said vessel has been attached by the United States Marshal under the process issued out of the above entitled Court, on the libel of the Marine Hardware Company, a corporation, in a cause of action civil and maritime and is now in the custody of the said United States Marshal.

II.

That intervener is now and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California.

III.

That the said Gasoline Launch Mountaineer is a domestic vessel and is now within the jurisdiction of this Honorable Court and within the Southern District of California.

IV.

That on the 25th day of March, 1920, for a valuable consideration, one Epifanio Marijani, owner and master of said vessel made, executed and delivered to interveners assignor, Halfhill Tuna Packing Company, his promissory note in words and figures as follows, to-wit:

"7750.00

Tacoma, Wash. Mar. 25, 1920

On or before one year after date, without grace I promise to pay to the order of Halfhill Tuna Packing Company, Seven Thousand Seven Hundred and FiftyDollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of 7% per cent per annum from date until paid, for value received, Interest to be paid, annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note: And in case suit or action is instituted to collect this Note or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, Fifty Dollars in like Gold Coin for Attorney's fees in said suit or action.

(Signed) Epifanio Marijani.

Due March 25th 1921

(\$1.56 U. S. Int. Revenue

At Los Angeles, Calif.

Stamps cancelled)

That at the time of the execution and delivery of said promissory note said master and owner of said vessel made, executed and delivered to said intervener's assignor, as security for the payment of said promissory note a mortgage upon that certain gasoline launch "Mountaineer" and that on the 31st day of March, 1920, said mortgage was duly recorded in Liber P. & E. 12 of mortgages folio 96 etc. in the office of the Collector of Customs of the Port of Seattle, Washington; that said port of Seattle was at the time said

mortgage was recorded the home port of said vessel and that the said Collector of Customs is the office in which said vessel was at said time duly enrolled and licensed under and by virtue of the Acts of Congress in such cases made and provided.

That thereafter and on the 16th day of March, 1921, said mortgage was duly recorded in Liber Book 1351-4 page 110 of mortgages in the office of the Collector of Customs of the Port of Los Angeles; that the port of Los Angeles is now and ever since the 15th day of March, 1921, was the home port of said vessel and the office of said Collector of Customs is the office in which said vessel was ever since said 15th day of March, 1921, and still is duly enrolled and licensed under and by virtue of the Acts of Congress in such cases made and provided.

V.

That on the 20th day of March, 1921, said Halfhill Tuna Packing Company for a valuable consideration assigned all of its right, title and interest in and to the said promissory note and mortgage to Halfhill Packing Corporation, and that said Halfhill Packing Corporation is now and ever since the 20th day of March, 1921, has been the owner and holder thereof.

VI.

That under and by virtue of the terms of said mortgage there became due and payable to said intervener on the 25th day of March, 1921, Seven thousand, seven hundred and fifty dollars (\$7,750.00) together with interest thereon at the rate of 7 per cent. (7%) per annum.

That intervener has demanded of said master and owner the payment of said sum but that he has refused to pay said sum or any part thereof and that the whole thereof remains wholly due and unpaid.

VII.

In answer to the libel of the Marine Hardware Company, intervener alleges that it has no knowledge or information sufficient to form a belief as to the allegations of the libel which sets forth an alleged sale of certain materials and supplies furnished to the gasoline launch "Mountaineer" and it therefore neither admits or denies the same but leaves the allegations thereof to be proven by the said libellant as he may be able so to do and as may be advised.

WHEREFORE intervener prays that it be the decree *if* this court that no maritime lien exists in favor of libellant and against said gasoline launch "Mountaineer" or in the event said court finds that a maritime lien exists in favor of libellant that intervener have judgment on said mortgage in the sum of Seven thousand, seven hundred and fifty dollars (\$7750.00) together with interest and that said judgment be declared a lien and charge upon said vessel superior to the lien of the Marine Hardware Company and that said vessel may be condemned and sold to pay the amount due intervener together with interest and costs and the intervener may have such other and further relief as in law and justice it may be entitled to receive.

L. K. Vermille and
Overton Lyman & Plumb

'Proctors for Intervener.

SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

ss.

H. J. HALFHILL, being duly sworn, says: That he is Vice-President of the Intervener named above; that the foregoing libel in intervention is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

H. J. Halfhill

Subscribed and sworn to before me, this 15th day of October, 1921. L. K. Vermille, Notary Public in and for the County of Los Angeles, State of California.

(Seal)

[Endorsed]: ORIGINAL. No. 1027 Civil Dept.
..... UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION MARINE HARDWARE
COMPANY, a corporation, Libellant -vs- GASOLINE
LAUNCH "MOUNTAINEER" Respondent HALF-
HILL PACKING CORPORATION a corporation,
Intervener LIBEL IN INTERVENTION OF THE
HALFHILL PACKING CORPORATION, a corpora-
tion. FILED OCT 17 1921 Chas. N. Williams, Clerk
By R S Zimmerman Deputy Clerk OVERTON,
LYMAN & PLUMB 1300 Stock Exchange Bldg. Los
Angeles, Calif. Attorneys for Intervener.

At a stated term, towit: the July, A. D., 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the fifth day of December, in the year of our Lord, One thousand nine hundred and twenty-one;

Present:

The Honorable Benjamin F. Bledsoe, District Judge.	
Marine Hardware Company, Libellant,	} No. 1027 Civ.
vs.	
The Gasoline Launch "Mountaineer," Respondent.	

This cause coming on at this time, EX PARTE, for hearing on motion for reference to special master; now, upon motion of Montgomery Phister, Esq., appearing as proctor for libellant, it is by the court ordered that this cause be referred to Stephen G. Long, U. S. Commissioner, as Special Master, for hearing and report.

NOW THEREFORE, I, Stephen G. Long, United States Commissioner, to whom said cause was referred do report that the above entitled cause was set down for hearing before me on the 15th day of December, 1921, and was on said day continued for further hearing on the 23rd day of December, 1921, in the Federal Building in the City of Los Angeles, California; that on said dates and at said place came the Marine Hardware Company, Libellant, and Mitchell Marincovich, Paul Bogdanich, August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, Interveners, represented by Loucks & Phister, their Proctors, Babare Brothers, a corporation, Interveners, and Babasa Brothers, a corporation, Interveners, represented by Smith & Nix, their Proctors, and Halfhill Packing Corporation, a corporation, Interveners, represented by L. K. Vermille, and Overton, Lyman & Plumb, its proctors, whereupon evidence both oral and documentary was introduced by the Libellant and by each of said interveners, and having considered said evidence and the arguments of the proctors of the various parties hereto, I do find as follows:

I.

That the Gasoline Launch "Mountaineer" was at the time of the libel herein was filed, a domestic vessel within the jurisdiction of this Honorable Court and within the Southern District of California, and that prior to the libel of the same, it was and now is owned, used and operated by one Epifanio Marijani, as a purse seine fishing boat, and that said vessel at all

times since the filing of said libel has been in the custody of the United States Marshal.

II.

That said vessel was specially constructed, designed and built to be used as a purse seine fishing vessel and that said vessel was partially constructed at Tacoma, State of Washington, and fully completed, for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, at Los Angeles Harbor, California, by the Marine Hardware Company, who furnished the balance of the original equipment, to-wit: the material and equipment for the purse seine net.

III.

That between the 12th day of May, 1920, and the 18th day of June, 1920, the libellant, at the request of the owner of said vessel furnished to said vessel certain original equipment consisting of materials for the purse seine net amounting to the sum of \$6703.49, upon which said sum there has been paid the sum of \$2,000.00, leaving the balance due on said original equipment in the sum of \$4703.49. Under the weight of authority said materials so furnished are a part of the original construction and equipment of said vessel and therefore do not constitute a maritime lien. That under and by virtue of the laws of the State of California said libellant did not at the time of the filing of the libel herein have a lien on said vessel for the furnishing of said original equipment.

That between the 18th day of June, 1920, and the 18th day of July, 1921, the libellant at the request of the master and owner of said vessel furnished certain materials and supplies, consisting of miscellaneous articles of ship chandlery to said vessel; that the reasonable value of said materials and supplies is now and was at the time the same were furnished, the sum of \$78.90.

That libellant has made repeated demands upon the master and owner for the payment of said supplies but that he refused and still refuses to pay said sum or any part thereof, and that the whole thereof, to-wit: the sum of \$78.90 remains due, owing and unpaid to libellant, and that libellant has a maritime lien on said vessel therefor.

THAT IN RESPECT TO THE LIBEL IN INTERVENTION OF MITCHELL MARINCOVICH, PAUL BOGDANICH, AUGUST FELANDO, doing business under the firm name and style of SAN PEDRO GROCERY AND MEAT MARKET, AGAINST THE SAID VESSEL, I DO FIND AS FOLLOWS:

I.

That the claim of Interveners, Mitchell Marincovich, Paul Bogdanich, August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market is a claim for groceries and supplies furnished the said vessel at the request of the master and owner thereof between the 13th day of December, 1920, and the 18th day of July, 1921. That the reason-

abel value of said supplies so furnished is now, and was at the time they were furnished, the sum of \$338.09. That no part of said sum of \$338.09 has been paid, and the whole thereof remains due, owing and unpaid to said intervener, and that said intervener has a maritime lien on said vessel therefor.

IN RESPECT TO THE LIBEL IN INTERVENTION OF BABARE BROTHERS, A CORPORATION, AGAINST THE SAID VESSEL, I DO FIND AS FOLLOWS:

I.

That Babare Brothers, a corporation, had a contract for the construction of said vessel. That upon said contract there remains an unpaid balance in the sum of \$1153.30.

That said claim is for the original construction of said vessel and not a claim under a maritime contract and therefore not subject to admiralty jurisdiction. That said Babare Brothers did not at the time of the filing of the libel herein have a State lien on said vessel therefor.

IN RESPECT TO THE LIBEL IN INTERVENTION OF BABASA BROTHERS COMPANY, a corporation, AGAINST THE SAID VESSEL, I DO FIND AS FOLLOWS:

I.

That the claim of intervener, Babasa Brothers Company, a corporation, is a claim for groceries and supplies furnished to the said vessel at the request of the master and owner thereof, during the month of March,

1920. That the reasonable value of said supplies so furnished is now and was at the time they were furnished, the sum of \$481.50. That no part of said sum of \$481.50 has been paid and the whole thereof remains due, owing and unpaid to said intervener, and that said intervener is entitled to a maritime lien on said vessel therefor.

IN RESPECT TO THE LIBEL IN INTERVENTION OF HALFHILL PACKING CORPORATION AGAINST SAID VESSEL, I DO FIND AS FOLLOWS:

I.

That on the 25th day of March, 1920, for a valuable consideration, Epifanio Marijani, owner and master of said vessel made, executed and delivered to said intervener's assignnor, Halfhill Tuna Packing Company, his promissory note in the sum of \$7,750.00.

That at the time of the execution and delivery of said promissory note, said master and owner of said vessel made, executed and delivered to said intervener's assignnor, as security for the payment of said promissory note, a mortgage upon said vessel and that on the 31st day of March, 1920, said mortgage was duly recorded in Liber R. & E. of Mortgages, folio 96 etc. in the office of the Collector of Customs of the Port of Seattle, State of Washington; that said port of Seattle was, at the time said mortgage was recorded, the home port of said vessel and that the said office of the said Collector of Customs is the office in which said vessel was at said time duly enrolled and licensed

under and by virtue of the Acts of Congress in such cases made and provided.

That thereafter and on the 16th day of March, 1921, said mortgage was duly recorded in Liber Book 1351-4, page 110 of Mortgages in the office of the Collector of Customs of the Port of Los Angeles; that the Port of Los Angeles is now and ever since the 15th day of March, 1921, was the home port of said vessel and the office of said Collector of Customs is the office in which said vessel was ever since said 15th day of March, 1921, and still is duly enrolled and licensed under and by virtue of the Acts of Congress in such cases made and provided.

II.

That said note and mortgage was thereafter duly and regularly assigned by the Halfhill Tuna Packing Company, a corporation, to the Halfhill Packing Corporation, a corporation, intervener herein, and that said Halfhill Packing Corporation is now the owner and holder thereof.

That no part of the principal or interest upon said promissory note and mortgage has been paid and that there now remains due, owing and unpaid on said promissory note and mortgage to the Halfhill Packing Corporation, the sum of \$7,750.00, together with interest thereon at the rate of seven (7%) per cent. per annum from the 25th day of March, 1920.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FACTS, I DO FIND AS FOLLOWS:

I.

That libellant, Marine Hardware Company, is entitled to recover judgment against the said vessel, her engines, tackle, apparel and furniture in the sum of \$78.90, and for costs of libel;

That said claim is a maritime lien against said vessel, her engines, tackle, apparel and furniture.

II.

That intervener, Mitchell Marincovich, Paul Bogdanich August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, is entitled to recover judgment against said vessel, her engines, tackle, apparel and furniture in the sum of \$338.09, together with costs of libel in intervention.

That said claim is a maritime lien against said vessel, her engines, tackle, apparel and furniture.

III.

That intervener, Babasa Brothers Company, a corporation, is entitled to recover judgment against said vessel, her engines, tackle, apparel and furniture in the sum of \$481.50, together with costs of libel in intervention.

IV.

That intervener, Halfhill Packing Corporation, is entitled to recover judgment against said vessel, her engines, tackle, apparel and furniture in the sum of \$7,750.00, together with interest thereon at the rate of seven (7%) per cent. per annum, from the 25th day of March, 1920, and for costs of libel in intervention.

V.

That the said maritime liens of Marine Hardware Company, libellant, Mitchell Marincovich, Paul Bogodanich, August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, intervener, and Babasa Brothers Company, a corporation, intervener, above described, are and each of them is superior to the lien of intervener Halfhill Packing Corporation, and the said lien of intervener, Halfhill Packing Corporation shall not be paid until all of said maritime liens together with costs and expenses have been fully satisfied and paid.

VI.

That the claim of Babare Brothers, a corporation is disallowed for the reasons herein stated.

That the portion of the libel of the Marine Hardware Company relative to the original equipment furnished to said vessel is disallowed for the reasons herein stated.

In arriving at the foregoing conclusions I have carefully considered the following authorities cited by the proctors for libellant and intervener Halfhill Packing Corporation respectively:

Libellant's authorities:

The Manhattan 46 Fed. 797

The Dredge A 217 Fed 617, and cases cited.

Intervener's authorities:

The Glenmont 32 Fed. 703.

The Glenmont 34 Fed. 402.

People)s Ferry Co. vs. Beers, 20 How. 393 15
L. ed. 961

Roach vs. Chapman, 22 How. 129, 16 L. ed. 294

Edwards vs. Elliott, 21 Wall. 532, 22 L. ed 487
at pages 491-2

The Winnebargo, 205 U. S. 354, 51 L. ed. 836
at page 840.

The Isosco, Fed. Cas. No. 7,060.

The Paradox, 61 Fed. 860

McMaster vs. One Dredge, 95 Fed. 832.

The United Shores, 193 Fed. 552.

The Dredge "A", 217 Fed. 617, at pp. 629-30

Thames Towboat Co. vs. Schooner Francis Mc-
Donald, 254 U. S. Supreme Court Reports
244.

All of which is respectfully submitted.

Dated, Los Angeles, California, January 16th, 1922.

(Seal)

Stephen G. Long

United States Commissioner.

[Endorsed:] ORIGINAL. No. 1027—Civil Dept

..... UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

MARINE HARDWARE COMPANY, a corpora-
tion, Libellant, - vs - GASOLINE LAUNCH "MOUN-
TAINEER," Respondent, HALFHILL PACKING
CORPORATION, a corporation, Intervener.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

FILED JAN 17 1922 CHAS. N. WILLIAMS,
Clerk By Edmund L Smith Deputy Clerk Overton,
Lyman & Plumb 1300 Stock Exchange Bldg. Los An-
geles, Calif. Attorneys for Intervener

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

MARINE HARDWARE :
COMPANY, a corporation, :
Libellants, :

- vs -

GASOLINE LAUNCH :
"MOUNTAINEER," :
Respondent, :

HALFHILL PACKING :
CORPORATION, a cor- :
poration, :
Intervener. :

NOTICE OF
SIGNING AND
FILING OF
UNITED STATES
COMMISSIONER'S
REPORT.

To MARINE HARDWARE COMPANY, a cor-
poration, Libellant, and to LOUCKS & PHISTER,
Proctors for said Libellant;

To MITCHELL MARINCOVICH, PAUL BOG-
DANICH, AUGUST FELANDO, doing business
under the firm name and style of SAN PEDRO GRO-
CERY AND MEAT MARKET, intervener, and to
LOUCKS & PHISTER, Proctors for said Intervener;

To BABASA BROTHERS COMPANY, a corporation, Intervener, and to SMITH & NIX, Proctors for said Intervener;

To BABARA BROTHERS COMPANY, a corporation, Intervener, and to SMITH & NIX, Proctors for said Intervener;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the report of Stephen G. Long, United States Commissioner, including his findings of fact and conclusions of law in the above entitled cause, was by him signed and filed on Tuesday the 17th day of January, 1922, in the United States Clerk's office of the above entitled court.

DATED, January 17th, 1922.

L. K. Vermille

Overton Lyman & Plumb

Proctors for Intervener, Halfhill Packing Corporation.

[Endorsed]: ORIGINAL. No. 1027—Civil Dept.
..... UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MARINE HARDWARE COMPANY, a corporation, Libellant, - vs - GASOLINE LAUNCH "MOUNTAINEER," Respondent, HALFHILL PACKING CORPORATION, a corporation, Intervener. Received copy of the within notice this 19 day of Jan., 1922 Smith & Nix Loucks & Phister. Proctor.. for NOTICE OF SIGNING AND FILING OF UNITED STATES COMMISSIONER'S REPORT.

FILED JAN 25 1922 CHAS. N. WILLIAMS, Clerk
By R S Zimmerman Deputy Clerk Overton, Lyman
& Plumb 1300 Stock Exchange Bldg. Los Angeles,
Calif. Attorneys for Intervener.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE	:	
COMPANY, a corporation,	:	No. 1027
Libellant,	:	
	:	EXCEPTION OF
VS.	:	
	:	LIBELLANT,
GASOLINE LAUNCH	:	
"MOUNTAINEER,"	:	MARINE HARDWARE
Respondent,	:	
	:	COMPANY.
MITCHELL MARINCO-	:	
VICH, et al,	:	
Interveners.	:	

The libellant, Marine Hardware Company, a corporation, hereby excepts to the Commissioner's Report on file herein upon the following grounds, to-wit:

I.

That the evidence is insufficient to support the Findings of the Commissioner respecting the Libel of the Marine Hardware Company, a corporation, and in particular that part of the Findings contained in Paragraph 3 of the Report beginning on Line 31 on Page 2; said finding being as follows to-wit:

"The Libellant furnished to said vessel certain original equipment consisting of materials for the purse seine net Under the weight of authority said materials so furnished are a part of the original construction and equipment of said vessel and therefore do not constitute a Maritime Lien. That under and by virtue of the Laws of the State of California, said Libellant did not at the time of the filing of the Libel herein have a Lien on said vessel for the furnishing of said original equipment."

Their being not sufficient evidence to support the finding that the materials so furnished are and were a part of the original equipment of the said "Mountaineer"; that the only evidence introduced to support said finding is contained in the cross-examination of Mr. Mariani, beginning on Page 80 and ending on Page 87 of the Transcript on file herein; That the said Mariani testified as follows, over the objection of the Libellant, to-wit:

"That he was the only master of the Boat "Mountaineer"; that the boat was built at Tacoma, Washington, by Barbare Brothers; that the contract of building is in evidence; that the boat was built for the fishing business, and the boat was known as a purse seine fishing boat; that it could not be used for purse seine fishing without a net; that it did not have a net on it at the time he bought it in Washington; that the boat came down from Washington under its own power, and that a net was furnished to it at San Pedro; that a purse seine fishing boat is the same thing as an

ordinary fishing boat; that it has a different winch, a big broad stem and a large platform upon it for a net."

II.

That the Commissioner erred in overruling the Libellant's objections in the following particulars, to-wit:

"Q. How is the boat constructed?"

"Mr. Phister: I object to the question as an improper cross-examination at this time."

"The Master: Objection overruled." Page 81, line 23 of transcript.

"Q. Did it have a net at the time you bought it, in Washington?"

Mr. Phister: That is objected to as incompetent, irrelevant and immaterial; it is immaterial; ~~there is~~ no pleading here setting up any defense other than the denial of our account. It is not really a denial of our account, but is simply a statement to put us on our proof, neither admitting nor denying it. It is apparent he is setting up here a special defense.

The Master: Objection overruled." Page 84, line 16 to page 85, line 18 of transcript.

"Q. As soon as you got to San Pedro you went and bought this net?"

Mr. Phister: That is objected to as incompetent, irrelevant and immaterial.

The Master: Objection overruled." Page 86, line 13 to 18 of the transcript.

III.

That the findings of fact as hereinbefore set forth

do not support the conclusion of law as set forth in said Report.

IV.

That the findings as hereinbefore set forth are not material to the issues as raised by the pleadings.

Loucks & Phister.

Proctors for Libellant, Marine Hardware Company.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE	:	
COMPANY, a corporation,	:	No. 1027
Libellant,	:	<u> </u>
	:	POINTS AND
VS.	:	<u> </u>
	:	AUTHORITIES
GASOLINE LAUNCH	:	<u> </u>
"MOUNTAINEER,"	:	ON EXCEPTIONS.
Respondent,	:	<u> </u>
	:	

All materials and supplies furnished after the vessel is completed, in the water under her own power, and ready to engage in the work for which she was intended constitutes a maritime lien enforceable in admiralty.

The Dredge A, 217 Fed. 617.

George A. Harvey, 273 Fed. 973.

North Pacific Steamship Company vs. Hall, 249

U. S. 119.

The only things held to be part of the original equipment are the hull, the engines and boilers, and the actual construction contracts.

The Paradox, 61 Fed. 860.

Peoples Ferry Company vs. Beers, 20 How. 393.

Roach vs. Chapman, 22 How, 129.

The Claimant by failure to deny that the Libellant has a maritime lien, admits the existence and merely puts the Libellant on proof as to the correctness of the amount of his claim.

The Hattie Thomas, 262 Fed. 945.

Respectively submitted:

Loucks & Phister

Proctors for Libellant.

[Endorsed]: ORIGINAL NO. 1027 DEPT.....
IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION, IN AD-
MIRALTY MARINE HARDWARE COMPANY,
a corporation, Libellant, VS. GASOLINE LAUNCH
"MOUNTAINEER" Respondent, MITCHELL MA-
RINCOVICH, et al, Interveners. EXCEPTION OF
LIBELLANT MARINE HARDWARE COMPANY.
FILED JAN 27 1922 CHAS. N. WILLIAMS, Clerk,
By Edmund L Smith Deputy Clerk Law offices
LOUCKS & PHISTER MARINE BANK BUILD-
ING SAN PEDRO CALIFORNIA Telephone 1065

At a stated term, towit: the July, A. D., 1922, Term
of the District Court of the United States of America,
within and for the Southern Division of the Southern
District of California, held at the Court Room thereof,

in the City of Los Angeles, on Wednesday, the Second day of August, in the year of our Lord One thousand nine hundred and twenty-two; Present:

The Honorable Benjamin F. Bledsoe, District Judge.		
Marine Hardware Company, a cor-)	
poration,)	
	)	No. 1027 Civil.
Libellant,)	
vs.)	
Halfhill Packing Corporation,)	
Intervenor.)	

This cause coming on at this time ex parte; now, good cause appearing therefor, it is by the court ordered that exceptions to Special Master's Report filed herein be overruled and that said Report be and the same is hereby confirmed in accordance with memorandum opinion filed herein.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

MARINE HARDWARE	:	
COMPANY, a corporation,	:	
Libellant,	:	
	:	
- vs -	:	
	:	
GASOLINE LAUNCH	:	FINAL DECREE
"MOUNTAINEER,"	:	
Respondent,	:	No. 1027—Civil
	:	
HALFHILL PACKING	:	
CORPORATION, a cor-	:	
poration,	:	
Intervener.	:	
	:	

At a stated term of the District Court of the United

States of America, in and for the Southern District of California, Southern Division, held at the Court Room in the Federal Building in the City of Los Angeles, California, on the 18th day of August, 1922;

Present, Honorable Oscar A. Trippet, District Judge;

It appearing to this Court that a libel was filed by the Marine Hardware Company, a corporation, against the Gasoline Launch "Mountaineer," her tackle, apparel, and furniture on the 28th day of September, 1921, alleging among other things that said Marine Hardware Company had furnished certain materials and supplies to said launch; and that subsequent to the filing of said libel, to-wit: on the 17th day of October, 1921, the Halfhill Packing Corporation, a corporation, filed a libel in intervention, alleging that it was the owner of a mortgage against said vessel in the principal sum of \$7,750.00;

And it further appearing that Mitchell Marincovich, Paul Bogdanich and August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, also filed a libel in intervention against said vessel, her tackle, apparel and furniture, alleging that they had furnished certain groceries and supplies to said vessel;

And it further appearing that Babasa Brothers Company, a corporation, also filed a libel in intervention against said vessel, her tackle, apparel and furniture, alleging that said corporation had furnished certain groceries and supplies to said vessel;

And it further appearing Barbara Brothers Company, a corporation, also filed a libel in intervention

against said vessel, her tackle, apparel and furniture, alleging that said corporation had furnished certain groceries and supplies to said vessel;

And it further appearing that said Gasoline Launch "Mountaineer" was on or about the 1st day of October, 1921, seized by the United States Marshall, under process issued in the above entitled action, and has ever since remained and now is in the custody of this Honorable Court;

And the said Marshall having returned on the process issued in the above entitled cause that he had attached said vessel, her tackle, apparel and furniture, and given due notice to all persons claiming the same that this court would on the 17th day of October, 1921, proceed to the trial and condemnation of said vessel, her tackle, apparel and furniture should no claim be interposed for the same;

And the default of all persons other than the interveners having been duly entered;

And it further appearing that in pursuance of an order made on the 5th day of December, 1921, said cause was transferred and referred to Stephen G. Long, United States Commissioner, to hear testimony and make report, all parties having consented to said order of reference;

And this cause having on the 15th day of December, 1921, come regularly on to be heard in the pleadings before the said United States Commissioner and witnesses having been examined and evidence offered on behalf of the several parties, and the United States

Commissioner having on the 17th day of January, 1922, signed and filed his report herein, including his findings of fact and conclusions of law;

And exceptions to said Commissioner's report having been filed and come on regularly for hearing before this Court;

Now on motion of Overton, Lyman & Plumb, one of the proctors for intervener, Halfhill Packing Corporation;

IT IS ORDERED that the report of the said United States Commissioner be and the same is hereby in all particulars confirmed;

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the libellant, Marine Hardware Company, a corporation, have judgment against said launch "Mountaineer," her tackle, apparel and furniture in the sum of \$78.90; for United States Commissioner's fees in the sum of \$16.65; for proctors' docket fee in the sum of \$20.00; and the further sum of \$328.55, costs to be taxed by the clerk of this court, making in all the sum of \$444.10;

That the interveners, Mitchell Marincovich, Paul Bogdanich, and August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, have judgment against said launch "Mountaineer," her tackle, apparel and furniture, for the sum of \$338.09; for United States Commissioner's fees in the sum of \$—; for proctors' docket fee in the sum of \$20.00; and for the further sum of \$—, costs to be taxed by the clerk of this court, making in all the sum of \$358.09;

That the intervener, Babasa Brothers Company, a corporation, have judgment against said launch "Mountaineer," her tackle, apparel and furniture, for the sum of \$481.50; for United States Commissioner's fees in the sum of \$——; for proctors' docket fee in the sum of \$20.00; and for the further sum of \$7/40, costs to be taxed by the clerk of this court, making in all the sum of \$508/90;

That the intervener, Halfhill Packing Corporation, a corporation, have judgment against said launch "Mountaineer," her tackle, apparel and furniture, for the sum of \$7,750.00, together with interest thereon at the rate of seven (7%) per cent. per annum from the 25th day of March, 1920; for United States Commissioner's fees in the sum of \$16/65; for proctors' docket fee in the sum of \$20.00; and for the further sum of \$49/45, costs to be taxed by the clerk of this court, making in all the sum of \$9133/65;

That the judgments in favor of Marine Hardware Company, a corporation, Mitchell Marincovich, Paul Bogdanich and August Felando, doing business under the firm name and style of San Pedro Grocery and Meat Market, and Babasa Brothers Company, a corporation, are superior to and are to be satisfied first in full, together with proctors' docket fees, costs and expenses, before anything is paid to intervener, Halfhill Packing Corporation, a corporation, on their judgment against said vessel;

That the intervener, Barbara Brothers Company, a corporation, have and recover nothing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said gasoline launch "Mountaineer" be condemned and sold according to law and practice in such cases made and provided, and that a venditioni exponas issue accordingly; that the proceeds of such sale be paid by the Marshall to the Clerk of this Court, to be by the Clerk put into the registry of this Court to be disposed of according to law and this decree.

DATED, Los Angeles, California, August 14, 1922.

Trippet

JUDGE.

APPROVED AS TO FORM.

Loucks & Phister

Proctors for Libellant, and for interveners, Michell
Marincovich et al.

Smith and Nix
by Lloyd S Nix

Proctors for interveners, Babasa Brothers Company, a corporation, and Babara Brothers Company, a corporation.

Decree entered and recorded Aug 18 1922 CHAS. N. WILLIAMS, Clerk. By Edmund L. Smith Deputy Clerk.

[Endorsed!: ORIGINAL *No. 1027 Civil Dept.*
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION MARINE HARDWARE COMPANY, a corporation, Libellant - vs - GASOLINE LAUNCH "MOUNTAINEER," Respondent, HALFHILL

PACKING CORPORATION, a corporation, Intervener. FINAL DECREE FILED AUG 18 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy OVERTON, LYMAN & PLUMB 1300 STOCK EXCHANGE BLDG. LOS ANGELES, CALIF. Attorneys for intervener

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

Marine Hardware Company, a corpora-)	
tion,)	
	)	Libellant,
)	
vs.)	
Gasoline Launch "Mountaineer,"	)	1027 Civil
	)	Respondent.
Halfhill Packing Corporation, a corpora-)	
tion,)	
	)	Intervenor.

.....

Messrs. Loucks & Phister of San Pedro, Cal., Proctors for Libellant.

Messrs. Overton, Lyman & Plumb of Los Angeles, Cal., Proctors for Intervenor Halfhill Packing Corporation.

Messrs. Hunsaker, Britt & Cosgrove of Los Angeles, Cal., Amici Curiae.

MEMORANDUM OPINION.

Bledsoe, District Judge:—This cause is before the court upon exceptions taken by the above named libel-

lant to the report of the Special Master to whom the matters in issue were referred.

Among other things, the Special Master found with respect to the claim of libellants for the purse seine furnished to the Mountaineer, "that said vessel (The Mountaineer) was specially constructed, designed and built to be used as a purse seine fishing vessel and that said vessel was partially constructed at Tacoma, State of Washington and fully completed for the purpose of making it what it was intended to be and to enable it to enter upon the kind of business or navigation intended at Los Angeles Harbor, California by the Marine Hardware Company who furnished the balance of the original equipment, to-wit, the materials and equipment for the purse seine net." With respect to the asserted lien as for such purse seine net, the Commissioner reported that the contract for the same was non-maritime in nature and that in consequence there was no lien of which the United States District Court, sitting in Admiralty, had jurisdiction. No exception seems to have been taken to the finding hereinabove specially quoted. Assuming the exceptions made to cover the point, however, I am persuaded that the conclusion of the Commissioner is correct. The contract under which the vessel was originally constructed as set out in the claim of Barbare Brothers, intervenors, shows that the agreement was that the Mountaineer should be constructed for the Halfhill Packing Corporation and that it should be "one purse seine boat," etc. The contract and specifications, however, did not

provide for the furnishing by the contractor of the purse seine. It is apparent, therefore, that the boat was originally constructed as and for a purse seine fishing vessel and it seems clear that such a vessel is constructed in a matter substantially different from any other vessel. However that may be, it seems to be determined definitely by reason of a decision of the Supreme Court of the United States in *Thames Towboat Co. vs. The Schooner Francis McDonald*, 254 U. S. 242, that all agreements made "after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended," are not maritime and therefore do not come within the jurisdiction of the Admiralty Court. In the course of the opinion, it is said that *that* materials in controversy were furnished after the schooner was launched "but while yet not sufficiently advanced to discharge the functions for which intended" and because of this feature it was held that admiralty had no jurisdiction of the lien asserted with respect to such materials.

The language above quoted is taken from the *Iosco*, 7060 Fed. Cases in which a similar ruling was had. The decision also quotes with approval other federal cases among which is the *Glenmont*, 32 Fed. 703, which case was later approved by the Circuit Court in 34 Fed. 402 and in which it was held that the asserted lien under consideration had to do with materials which were furnished and were necessary "according to the original design." * * * "The original construction

it to enter upon the kind of business or navigation intended is a part of the 'building' of the vessel. This is the clear weight of authority."

In my judgment these decisions cited with approval by the Supreme Court of the United States, amply sustain the judgment and ruling of the Commissioner herein and because of that the exceptions hereto are overruled and his report is confirmed.

August 2, 1922.

[Endorsed] No. 1027 Civ. IN THE DISTRICT COURT OF THE UNITED STATES for the South. of Calif. Marine Hardware Co a corp. vs. Gas. Launch "Mountaineer" Memo. Opinion Filed Aug. 2—1922 Chas. N. Williams, Clerk, By Edmund L. Smith, Deputy.

of the boat contemplated all of the materials furnished to make the vessel serviceable from the beginning and no maritime lien exists." In the Paradox, 61 Fed. 860, also cited with approval by the United States Supreme Court and therefore presumably affirmed as to the language used and decision rendered, it was said: "When the vessel is completed for the purpose intended, then the vessel is 'built' and not till then; * * * and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable

IN THE DISTRICT COURT OF THE UNITED
STATES IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE COM-)	
PANY, a corporation,)	
Libellant and Appellant,)	
)	
vs)	
GASOLINE LAUNCH "MOUN-	)	ASSIGNMENTS
TAINER"	)	OF ERROR ON
	)	APPEAL.
Respondent,)	
)	
HALFHILL PACKING COR-)	
PORATION, a corporation,)	
Claimant and respondent.)	
)	

The Libellant and appellant herein hereby assigns error to the decree of the District Court of the United States for the Southern District of California in the above entitled cause in the following particulars:

1. In that the exceptions of the libellant to the report of the Special Master herein were overruled; and appellant relies upon and assigns as error each of the causes of exception set forth more particularly in its exceptions to said report of the said Special Master.

2. In that the Court erred in not giving judgment to the libellant herein for the full sum of Four thousand seven hundred three and 49/100 (\$4703.49) Dollars.

3. In that the Court erred in not decreeing that the libellant was entitled to a Maritime Lien against the

Gasoline Launch "Mountaineer" for the full sum of Four thousand seven hundred three and 49/100 (\$4703.49) Dollars, and in not decreeing that said sum be paid out from the Registry of the Court to the said libellant upon a sale of the said vessel.

4. In that the Court erred in finding that the materials furnished by the libellant, Marine Hardware Company, a corporation, were a part of the original construction and equipment of the said Gasoline Launch "Mountaineer."

5. In that by its final decree the Court did not decree that the Libellant have and recover of and from the said Gasoline Launch "Mountaineer" the sum of Four Thousand Seven Hundred eighty two and 39/100 (\$4782.39) Dollars, and that upon a sale of said vessel by the Marshal that said sum should be paid from the proceeds of such sale to the said Libellant, together with that of the other maritime lien claimants.

6. In that the Court erred in decreeing that the Halfhill Packing Corporation, a corporation, should recover judgment against the said vessel in the sum of Seven Thousand Five Hundred and no/100 (\$7500.00) Dollars.

7. In that the Special Master and the Court overruled the objections interposed to the following questions by the libellant:

Questions by Mr. Vermille on cross-examination of the witness Epifanio Mariani.

Q. How is the boat constructed?

Q. Could you go out and fish with this boat and use it as a Purse Seine boat without a net?

Q. Could you have used the boat for what it was built without a net?

Q. Did it have a net on it at the time you bought it in Washington?

Q. As soon as you got to San Pedro you went and got this net?

Q. It has a different kind of winch on it hasn't it?
Dated this 18th day of October, 1922.

LOUCKS & PHISTER

By Montgomery Phister.

Proctors for Appellant.

[Endorsed]: No. 1027. IN THE United States District Court Southern District of California Southern Division MARINE HARDWARE COMPANY, a corporation, *vs.* GASOLINE LAUNCH "MOUNTAINEER. ASSIGNMENT OF ERROR. *Received copy of the within assignments this 19 day of October 1922* A. L. Baldwin Smith & Nix. Overton Lyman & Plumb *Attorneys* for respondents. Filed Oct 25 1922 Chas. N. Williams, Clerk. By L. J. Cordes Deputy LAW OFFICES LOUCKS & PHISTER MARINE BANK BUILDING SAN PEDRO, CALIFORNIA. Attorneys for appellant.

C. E. TAYLOR, .

called as a witness on behalf of libelant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PHISTER:

Q Please state your name.

A C. E. Taylor.

Q You are secretary of the Marine Hardware Company, the libelant in this proceeding?

A Yes, sir.

Q You have general supervision of the books of the Marine Hardware Company?

A I do.

Q Are you acquainted with the boat "Mountaineer" and the owner of that boat?

A Yes.

Q I show you a sheet of paper and ask you what that is.

A That is the ledger account against the boat "Mountaineer."

Q That is taken from your ledger, is it?

A Yes, sir.

Q And is a part of your bookkeeping system?

A A part of our ledger.

Q Does that show the correct amount due from the boat "Mountaineer" to the Marine Hardware Company?

A Yes. There is an item of interest in there, though, that was not put in on the bill. When we made our libel we didn't add any interest.

Q That amount corresponds with the amount alleged in your libel?

A Yes, out side of the item of interest.

MR. VERMILLE: We would like to object to the offer of that in evidence on the ground that they have not proved delivery as yet to the boat. They have not established any claim.

MR. PHISTER: That is true.

THE MASTER: The objection will be overruled, subject to a motion to strike out in the event it is not shown. It will be received and marked Libelant's Exhibit No. 1.

Q BY MR. PHISTER: I show you a paper and ask you if you recognize that signature (handing paper to witness).

A Yes; that is Mariana's signature.

Q He is the owner of the boat "Mountaineer"?

A Yes, sir.

Q And what was the consideration for that note?

A That was given as an evidence note on account of the boat. We didn't waive any liens against the boat on that.

Q What was the nature of the charges on that account that has just been submitted?

A Well, it is to draw interest for 60 days.

Q No; I mean what was it sold and delivered for—items of hardware supplies?

A Yes. There were nets and corks and things like that.

Q Different things that go in to make up supplies for the boat?

A Yes, for fishing.

Q Were things actually delivered to the boat "Mountaineer", so far as you know?

A Yes, sir, so far as I know they were.

Q Has any of that amount been paid?

A Well, on the original amount there have been some payments made, as the ledger sheet shows.

Q But not other than the ledger sheet shows?

A No.

Q Amounting to a balance of \$4,852.60, with interest at six per cent from - -

A Well, there is an item of \$71 in that note there.

Q With interest from October 19, 1920. That is the amount due and unpaid from the boat "Mountaineer" - -

A Yes.

Q Was that stuff sold on credit to the "Mountaineer"?

A Yes, sir.

Q And solely on the credit of the launch "Mountaineer"?

A Yes, sir.

MR. OVERTON: That is objected to as calling for a conclusion of the witness.

THE MASTER: The objection is sustained.

Q BY MR. PHISTER: You expect to get your payment out of the boat?

MR. OVERTON: We object to that as calling for a conclusion of the witness.

A We certainly do. That is, we expect the boat to be security for the payment.

MR. OVERTON: We object to it for the same reason.

THE MASTER: Do you move to strike it out?

MR. OVERTON: We move to strike it out.

THE MASTER: I will deny the motion. Did you offer this in evidence?

MR. PHISTER: Well, no, I want to withdraw it, because we don't want to lose it. I will offer it with a stipulation that it may be withdrawn. That is the one to which the objection was made that no foundation had been laid.

THE MASTER: Are you through with this witness.

MR. PHISTER: Yes.

THE MASTER: You may cross-examine.

MR. VERMILLE: We would like to ask permission to recall the witness later on for cross-examination.

MR. OVERTON: It may not be necessary to.

THE MASTER: I want to ask a few questions in regard to this matter. Let me see that paper that was offered.

MR. VERMILLE: That was not offered, Your Honor. The original entry was the only thing offered in evidence.

THE MASTER: This is not the paper on which you examined the witness here a few moments ago, is it?

MR. PHISTER: No. The one you have in your hand is the one.

Q BY THE MASTER: Does the sum stated in this note of October 19, 1920, include the items of this book account?

A In full. It includes that \$71 interest, I believe, there that we figured was due up to the time this note was taken, from the time the net was delivered.

Q It includes all of these items and a balance besides?

A No; it is exactly the same as the ledger, though. It is the difference between the two sides of the ledger sheets.

THE MASTER: That is all. This is not offered in evidence, as I understand.

MR. PHISTER: Yes, that is offered in evidence.

THE MASTER: It will be received and marked Libelant's Exhibit No. 2.

MR. PHISTER: We offer that for the purpose of showing the amount of the account, that is all.

That is all.

THE MASTER: And you wish to recall him for cross-examination later.

ROGER CLARKE,

a witness called on behalf of the Libelant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PHISTER:

Q Please state your name.

A Roger Clarke.

Q You were an employe of the Marine Hardware Company during 1920 and 1921?

A I was; up until June, 1921.

Q Are you familiar with the business of the Marine Hardware in respect to dealing with boats?

A I am.

Q And in respect to delivery of merchandise to boats?

A Yes, sir, I am.

Q What is that custom?

MR. VERMILLE: We object to what the custom is. That has nothing to do with the case.

MR. PHISTER: It is merely a method of showing delivery, that is all.

THE MASTER: Well, what was done in this case is the question. I will sustain the objection.

MR. PHISTER: I am simply trying to show that in their general course of business whenever any deliveries are made to a boat they simply take the signature of the master of the boat, and whenever that signature appears upon their original sales slips that particular item was delivered to the boat. Then I am going to show these sales slips which were signed by the master of the boat. That was my purpose in proving the custom.

THE MASTER: Well, I will sustain the objection, but if you want to reframe the question it can be answered.

MR. PHISTER: I will withdraw the question and ask it in a little different form.

THE MASTER: What he did in this case.

MR. PHISTER: Well, he was not the actual person in this case, of course, that made all the deliveries.

Q Now, Mr. Clarke, I show you a slip of paper and ask you if you know what that is (handing paper to witness)?

A This is the charge ticket for a bill of goods for the boat "Mountaineer."

Q Is that your handwriting on there?

A It is. I made the charge ticket.

Q Did you deliver those goods to the boat?

A I made the delivery of this order.

Q Do you recollect specifically of actually delivering that aboard the boat?

A I do.

Q I show you this one (handing paper to witness). What is that?

MR. OVERTON: Let us take these one at a time.

MR. PHISTER: All right.

A Well, this is a duplicate of the other one.

Q That is a duplicate of this one?

A That is the duplicate bearing the signature of the captain when we made delivery to the boat.

Q You actually delivered those articles aboard the boat?

A Yes, sir.

Q And on the order of the master?

A Yes, sir.

THE MASTER: How are you going to identify that for the reporter?

MR. PHISTER: Well, I will offer this in evidence in this suit. This is headed "Marine Hardware Company, Inc.", Ship Chandlery, Hardware, Paints and Oils; 509 Beacon Street, San Pedro, Cal., 6/14/1920. Sold to Bt 'Mountaineer'. Address E. Mariana."

MR. OVERTON: We can save you a good deal of time on that. Just let us glance over those, and I have no doubt these are all the regular form bills or slips of theirs, and then we can identify them as we go along by numbers.

MR. PHISTER: Yes.

MR. OVERTON: (Examining slips) These are all your slips, are they?

VOICE IN AUDIENCE: Yes.

MR. OVERTON: Let us identify each slip as we go along by the number.

THE WITNESS: This particular slip bears No. 1065.

MR. OVERTON: Is that the one you asked him about a few minutes ago?

MR. PHISTER: Yes; that is the one he has identified and said it was his handwriting, and that he personally delivered the goods aboard the boat "Mountaineer." Is that correct?

THE WITNESS: That is correct.

Q BY MR. PHISTER: And you took the order from the master of the boat?

A I made out the charge for it also.

MR. PHISTER: I offer that in evidence.

THE MASTER: It will be received and marked Libelant's Exhibit No. 3.

Q BY MR. PHISTER: I show you another one marked the same way and headed No. 1064. Do you recognize that?

A This is a charge ticket for nets furnished to the boat "Mountaineer."

Q Is that your handwriting on that one too?

A It is. Direct to the ship.

Q How did you do it?

A The net was in storage in the warehouse of the Outer Harbor Dock & Wharf Company, and the boat was brought alongside the dock and the net was taken alongside the dock and put right on board the boat.

Q You supervised it personally?

A I helped them make the tackle fast and fasten it to the port.

Q And you were at that time supervising the sale of --

A I had charge of the fishermens accounts and business.

MR. PHISTER: I offer this as Libelant' Exhibit No. 4. The amount is \$9,358.03; the date of it 6/14/20.

THE MASTER: It will be received and marked Libelant's Exhibit No. 4.

MR. PHISTER: The amount, 1065, by the way, is \$1,018.05. I think you can identify all these by this account here.

Q Now I show you this one and ask you if you recognize that signature down there (indicating).

A That is the signature of E. Mariana.

Q The master and owner of the boat "Mountaineer"?

A It is.

Q Were those supplies delivered on board the boat "Mountaineer"?

A The only way I would be able to say would be the signature on the delivery slip. That is the only way I could say that.

Q How do you know that there was a delivery slip on that?

A There is another copy of this, which is the original copy on file, the delivery slip having been given with the goods and signed for by the owner of the boat, which was moored at this time in the San Pedro Lumber yard.

Q Now this particular slip bears no number, by the way, but it is in the amount of \$17.30.

A That is June 16.

MR. OVERTON: Why not mark something on the top of it?

MR. PHISTER: Well, I will put, right in there where it says "No", No. 1.

MR. OVERTON: Yes.

MR. PHISTER: I offer this as Libelant's Exhibit No. 5.

Q Do you recognize that signature?

A That is the signature of E. Mariana.

Q That is the same sort of sales slip as the other bearing No. 1509; and the amount of it is \$220.76. Could you say that was delivered on board the "Mountaineer" too?

A Only by the signature of delivery, where it is marked "Received by" and signed by Mariana.

Q And that is only done where it is delivered on board the boat by order of the master?

A Yes.

MR. PHISTER: I offer that in evidence as Libellant's Exhibit No. 6.

Q I show you another one. Do you recognize that signature on there? This is the same form and bears No. 623.

A It was signed on delivery by E. Mariana.

Q That was delivered on board the "Mountaineer" at the order of the owner or master?

A The only way we have of proving it is the receipt by the captain.

Q And when that is marked that way you know it was delivered at the boat?

A According to our delivery system that is signed as it goes aboard the ship.

Q And only at that time?

A Yes.

Q I show you another slip headed the same, bearing No. 607, \$4.60, with a name signed to it. Do you recognize that name?

A I recognize it as E. Mariana's signature.

Q Was that delivered on board the boat "Mountaineer" on the order of the master?

A It was receipted for by Mariana, which is our way of - -

Q In accordance with the same custom as the others?

A Yes, of proving the delivery to the ship.

MR. PHISTER: That is offered as Exhibit 8.

THE MASTER: It will be received.

Q BY MR. PHISTER: I show you another one on the same form, bearing No. 1058. Do you recognize that signature on there?

A It is the signature of E. Mariana.

Q Will you testify that that also was delivered on board the "Mountaineer" at the order of the master, E. Mariana?

A According to our regular custom of delivery, it is the signature, having been received of E. Mariana - -

Q That means that that was delivered on board that boat?

A Yes.

MR. PHISTER: We offer this as Exhibit 9.

Q I show you another one, of the same heading, No. 1070, \$4.10. Do you recognize that signature?

A It is the signature of E. Mariana.

Q The master and owner of the boat "Mountaineer"?

A Yes.

Q And were the goods on there named delivered on board the boat "Mountaineer" at the request of the master of the boat? Can you tell that by the signature?

A E. Mariana is signed as having received it, and the custom was to have it signed at the boat.

Q Therefore it must have been delivered on board the boat at his order?

MR. VERMILLE: We object to that, your Honor. That is all custom.

THE MASTER: What is it you object to?

MR. VERMILLE: In all these last accounts they have not proved delivery, but what their custom amounts to.

THE MASTER: Well, they have offered this as evidence of delivery. It was the custom of theirs to require the signature of the master when goods were delivered.

MR. PHISTER: He has testified that they required the signature of the master when goods were delivered on board the boat, and that is the only time they required the signature on these slips, and then we introduce the sales slips to show that each one of those was actually delivered on board the boat.

THE MASTER: It is a kind of secondary evidence.

MR. PHISTER: Well, it is the best evidence possible without bringing up each particular delivery boy that actually made the particular delivery.

THE MASTER: You will have to have a foundation for introducing such evidence.

MR. PHISTER: Well, no further foundation could be laid.

THE MASTER: I will receive it at this time subject to a motion to strike it out if it is not properly connected up. Do the little slips show who delivered the goods?

MR. PHISTER: They do not; no.

Q These slips don't show who delivery was made by?

A The signature on the slip would indicate that the goods had been received at the ship's side, or on board the ship by Mariana. All the rest of those slips, that is all they would prove. You might put them in all together if you like; they are all the same. We couldn't actually prove the delivery other than by the signature of the captain on the rest of them.

MR. PHISTER: May it be stipulated that they all go in under the same designation, subject to the same objection, with the understanding - -

MR. VERMILLE: Certainly.

MR. PHISTER: - - that that signature being on each of them is identified as the signature of the owner and master of the boat "Mountaineer"?

MR. VERMILLE: Well, we cannot stipulate to that, because we do not know.

MR. OVERTON: Let them all go in subject to the motion to strike out.

MR. VERMILLE: Yes.

THE MASTER: Yes.

MR. PHISTER: All right.

Q You have looked over all of these, have you?

A Yes.

Q They all bear the signature of - -

A Yes, there is one or two of them that haven't any signature.

MR. PHISTER: There is one for \$17.30 that doesn't have. We will cut that out.

Q Is that the signature up there? I don't know whether it is or not (indicating).

A It is not Mariana's signature; it is signed with a cross, by somebody for him.

Q All the rest of these have been signed by Mariana. What is that one (exhibiting)?

A That one is signed by Stephen Marincovich.

Q Who was he?

A He was probably one of the crew on the boat.

Q Now these slips I show you here, bearing the same heading, numbered 978, 918, 1349, 2269 and 1003, all are delivery slips of goods delivered aboard the "Mountaineer"; is that correct?

A Yes.

Q And each one of these slips is signed by E. Mariana?

A They are.

Q And because he has signed them you know the goods were delivered aboard the boat "Mountaineer" at the order of the Master; is that correct? That is, in accordance with the custom of your business?

A Yes.

Q Now is there any way to tell from any of those slips that have been introduced in evidence who actually delivered the goods aboard the boat other than the first two introduced in evidence which you recognize as your own handwriting and recall having delivered personally?

A I am not able to say.

Q Is there any system you have to determine who actually delivered the goods? How many men make

delivery of goods for the Marine Hardware Company to these boats?

A They usually employ from three to four men.

Q And do those men change very often?

A Not often.

Q They are truck drivers?

A Well, two of them are regular truck drivers. The other men worked in the store, and also part of the time on deliveries.

Q And you have no method of knowing which one of those three or four men actually made the delivery aboard this particular boat?

A I don't know about the delivery of any of them except the items which were delivered to the boat on June 14, which I personally made.

Q And the others there is no way that you know of determining who made the deliveries?

A No.

Q Are any instructions given to the delivery men with respect to obtaining signatures upon delivery?

MR. OVERTON: We object to that as hearsay.

THE MASTER: Well, if he knows the fact.

MR. VERMILLE: He is going back to custom again, your Honor.

THE MASTER: I will overrule the objection.

A The delivery men are instructed at all times to obtain the signature or to bring the goods back to the store.

Q BY MR. PHISTER: At the time it is delivered aboard the boat?

A Yes.

Q And that is the only time you take the signature, and that is the only time he is instructed to get a signature?

A On small purchases which are carried out of the store, something probably light in weight, the signature is given at the store and the goods -- very small articles -- are oftentimes carried to the ship.

Q By the master of the boat himself?

A Yes.

Q But they are only delivered to the master?

A Yes, to the master or --

Q Do you know whether or not this fellow Mariana, or whatever his name is, owned any other boat than the "Mountaineer"?

A I don't know of any other.

Q That he might have owned?

A No.

Q BY THE MASTER: Do you know of your own knowledge that he was master of this boat the "Mountaineer"?

A I do.

Q BY MR. PHISTER: All those goods were delivered at the port of San Pedro?

A They were.

Q In the city of Los Angeles; and were delivered on the credit of the boat. You looked to the boat for payment -- that is, the Marine Hardware Company?

A We did.

MR. PHISTER: That is all.

THE MASTER: Cross-examine.

MR. VERMILLE: Now if your Honor please, so as to get at the facts, we would like to find just exactly what was delivered to the boat. This witness does not know personally.

CROSS-EXAMINATION

BY MR. VERMILLE:

Q We will take the first account, No. 1065, and show this to the witness and ask him to examine the account and state what he knows about the actual delivery of each item thereon to the customer -- the "Mountaineer." This is Exhibit No. 3 (handing exhibit to witness).

A This is a charge ticket which I made for the supplies to the "Mountaineer."

Q Where was that charge ticket made?

A It was made in the Marine Hardware Company's store, and the goods were loaded on the truck at the Marine Hardware Company's warehouse and delivered over the wharf at the fish market to the boat "Mountaineer". I supervised the delivery of the goods and obtained the signature on the duplicate charge ticket from Mariana for these goods.

Q BY MR. OVERTON: Where is that duplicate charge ticket?

A You will find it, I believe, on the exhibit here.

Q BY MR. PHISTER: Do you mean this one here (indicating)?

THE MASTER: You didn't take the signature on the original, but on the duplicate; is that it?

A The charge for the other net that I delivered there myself, the charge ticket was made at the warehouse, and the original charge ticket -- we had the book there; we weighed the net, got the correct weights and all, and made the charge there. The original charge ticket, the net, of \$5,300, bears the signature of Mariana, as I had the charge book at the warehouse where the net was stored and where the boat was brought and delivery made.

Q When you make out the charge tickets you keep the original in the office, do you?

A Yes.

Q And send out with the goods the duplicate?

A Yes. Well, there are two slips follow the goods out.

Q One of them is then delivered with the goods and the other is signed for and returned?

A Yes; that is right.

Q Now take the next item, Libelant's Exhibit No. 4, No. 1064, a charge made by you, and I will ask you to explain how the delivery of those various items was made to the boat (handing exhibit to witness), and what you know of your own personal knowledge to that effect.

A This is an order that was placed with us for the net. The net was put in storage --

Q BY MR. OVERTON: Was it placed with you?

A I received the order from the captain -- Mr. Mariana, -- for the net. The net arrived and was put

in storage by us -- by the Marine Hardware Company -- at the Outer Harbor Dock & Wharf Company.

Q BY MR. VERMILLE: Now you are talking about a net.

A These are the nets.

Q How many nets?

A There is nine bales of net, making up one purse seine.

Q All right; just go ahead and explain.

A This net was stored there and Mariana notified, and he brought the boat "Mountaineer" to the dock and we put the net on board the boat.

Q BY MR. OVERTON: You were present there?

A I was present there and helped them get the net on board, and this is the original charge ticket made out by me, and it is signed by Mariana, as we were using that as our warehouse at that time and were making charges right there, and as we got the weights and made out the charge Mariana signed the original as well as the other two -- the duplicate and triplicate -- on this charge here.

Q BY MR. VERMILLE: You are sure no portion of this net was delivered to Mariana at his house?

A I am sure those nine bales were delivered right on board the ship. I helped them put them aboard.

Q And you never made delivery of any portion of this net to Mariana at his house to work on and make up into a purse seine?

A I did not. Our reason for putting the net in the warehouse and paying storage was so that we

could have it handy and could handle it. We could have the ship come there and get the net and save the trouble of handling it. You see, there was a good many tons of this net, and our own warehouse was too small for it, and we put it where the ships could come after it.

Q BY MR. OVERTON: When did you sever your connection with the Marine Hardware Company?

A June 15, 1921.

MR. VERMILLE: Now in order to save time, your Honor, I think that, instead of going down each one of these other items, I will just ask the witness this question:

Q Do you know of your own actual knowledge whether or not the balance of the statements as introduced in evidence by the libelant - - whether delivery of the goods was made to the boat?

A I do not.

Q Now you stated in your direct examination that the signature on the majority of these statements was made by the master, and that you only obtained the signatures at the time delivery was made to the boat. As a matter of fact don't you ever deliver anything to a party who would come in there to the store and sign your sales slip without seeing them actually go on board the boat?

A I have already stated that small items in many cases are carried out. It wouldn't be advisable to deliver a 10-cent order if the master came in the store and signed for it.

Q Well, we will have to go down these items. What do you mean by small items? 10 cents or up to how much?

A Well, if you came in the store to buy something and it weighed one pound you would take it back to the ship with you. Anything that could be carried easily by hand we didn't make a practice of delivering it. That charge ticket for rope there was not to be carried away easily by hand. This one here (indicating).

Q How do you know? Do you know of your own personal knowledge that was delivered to the boat?

A This one here.

Q What is the number of that -- Exhibit 6?

A The weight on this charge ticket here is 649 pounds. It is signed for by Mariana.

Q Now did you ever know a party to come in the store and sign a sales slip and tell you to deliver it some place?

A On all orders that were to be delivered we didn't receive the signature in the store.

Q Only orders that were carried away?

A That were carried away.

Q Did anybody ever come up to the store with an automobile or truck and put anything in the tonneau and go away with it and sign a sales slip, or does every order go out in your truck that is sent out of the store?

A Why, we have lots of people that haul their own stuff away, that have machines.

MR. VERMILLE: That is all.

REDIRECT EXAMINATION

BY MR. PHISTER:

Q Now that custom you speak of applies particularly to deliveries to boats, does it not?

A It does.

MR. OVERTON: Now we move to strike out the answer on the ground that it is incompetent, irrelevant and immaterial; that it is hearsay, and that it calls for a conclusion of the witness. The mere fact that they may establish a custom does not show delivery to the boat. They must show, as your Honor knows, a definite delivery to the boat, and the mere fact that a clerk or employe is instructed to obtain a signature when he delivers to the boat, particularly in view of Mr. Clarke's testimony already to the effect that things are allowed to go out of the store continually, and are signed for in the store, - - it negatives the custom right there.

THE MASTER: I will grant your motion, but allow it to remain in the record for the purpose of review.

MR. OVERTON: And at the same time we move that all of these slips, with the exception of Libelant's Exhibits Nos. 3 and 4, be stricken out on the same ground. Nos. 3 and 4 are the ones which he testified he actually delivered himself to the boat.

THE MASTER: You haven't closed your case, have you, Mr. Phister?

MR. PHISTER: Well, no, I have not.

MR. OVERTON: Then I will withdraw the motion at this time.

MR. PHISTER: But, so far as that is concerned, we have closed our case except for the redirect examination of this witness, which is going to proceed upon the grounds that I have just indicated.

THE MASTER: Do you want to further examine the witness?

Q BY MR. PHISTER: Now this slip marked Exhibit 14, could that have been carried away from the store (handing exhibit to witness)?

A The weight is 80 pounds.

Q That was undoubtedly delivered by one of your trucks on board the boat?

MR. OVERTON: That is objected to for the same reason. It calls for a conclusion, and is hearsay and incompetent, irrelevant and immaterial.

THE MASTER: The objection is sustained.

MR. PHISTER: The weight of that is 80 pounds, however. The objection was not sustained to that question, was it?

MR. OVERTON: I made no objection to that.

Q BY MR. PHISTER: With respect to this one here, what is the weight and bulk of that item -- Exhibit 11 (handing same to witness)? Can you tell from that?

A Approximately 25 pounds.

Q And this one here, what is the weight and bulk of that? That is marked Exhibit 9 (handing same to witness).

A Approximately 18 pounds.

Q And this one marked Exhibit 7, what is the approximate weight and bulk of that?

MR. OVERTON: We will stipulate that the weights shown on those tags are approximately correct, to save time.

MR. PHISTER: Well, apparently it doesn't state.

A Approximately 80 pounds.

Q BY MR. PHISTER: And this one, Exhibit 6?

A This one is 649 pounds.

Q Now you sometimes make deliveries to customers in the store who may carry away the goods in their own trucks. Is that ever done in the case of fishermen and the masters of fishing boats?

A No, it is not.

MR. OVERTON: We move to strike out the answer on the grounds as previously noted.

THE MASTER: I will grant the motion but allow the testimony to remain in for the purpose of review.

Q BY MR. PHISTER: Now in respect to this particular boat, the "Mountaineer". That is a purse seine fishing boat, is it not?

A It is.

Q Of about what tonnage?

A The boat is between 60 and 70 feet long.

Q It is the sort of boat that you ordinarily deal with in the course of your selling marine nets and marine hardware?

A It is the particular design of a boat and equipped and fitted to handle a net which is called a purse seine.

Q And it is the kind of boat that you personally require the master to receipt for goods purchased at the time the goods are delivered on board the boat?

A We require the signature on all boat deliveries.

MR. OVERTON: Pardon me. Will you read the question?

(Last question read.)

MR. OVERTON: We move to strike out the answer on the same grounds as previously stated.

THE MASTER: Same ruling, but it will be allowed to remain in for the purpose of review. Where is the master of this boat, Mr. Phister?

MR. PHISTER: I haven't any idea.

THE MASTER: Proceed.

MR. PHISTER: Libelants rest. Now on behalf of the intervener San Pedro Grocery & Meat Market I will ask Mr. Felando to take the stand.

* * * * *

CHARLES P. HALFHILL,

a witness called on behalf of the intervener Halfhill Packing Corporation, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VERMILLE:

Q Please state your name.

A Charles P. Halfhill.

Q What is your business and occupation?

A I am secretary and treasurer of the Halfhill Packing Corporation.

Q Intervener in this action?

A Yes, sir.

Q I show you a promissory note dated March 25, 1920, due on or before one year after date, in the sum of \$7,750.00, purporting to be signed by - - who is that signed by (handing paper to witness)?

A That is Mariana.

Q Was he the master and owner of the boat at that time?

A Yes, sir; he is the party we sold the boat to.

Q Is that his signature?

A Yes, sir.

Q Are you familiar with his handwriting?

A Yes.

Q I will ask you if anything has ever been paid on that note.

A Not a cent.

Q Neither principal nor interest?

A No.

Q Has any interest been paid on that note?

A I think not. I couldn't say positively as to that, but he has been a very poor fisherman and his account *has* away over all the time. I don't think anything has ever been paid on it.

Q Well, do you know?

A No, sir. Nothing has been paid on it.

Q I show you a mortgage from Epifanio Marajani to the Halfhill Tuna Packing Company. Was he the master and owner of the boat at that time?

A Yes, sir.

Q And will ask you who signed that?

A Marajani, the same fellow.

Q Is that Marajani's signature?

(Witness comparing same with note).

A Yes, sir.

MR. VERMILLE: We would like to introduce the note and mortgage in evidence, your Honor, to show that it was duly recorded in both Washington and San Pedro at the customs office; and we would like to withdraw them at any time if - -

THE MASTER: They may be received and marked and copies substituted in place of the originals.

Q BY MR. VERMILLE: I will ask you if that boat was the same boat that was libeled - - the boat referred to in the mortgage.

A Yes, sir.

Q BY MR. OVERTON: And that note is the same note as referred to in the mortgage?

A Yes, sir.

MR. VERMILLE: That is all.

CROSS-EXAMINATION

BY MR. PHISTER:

Q Any other mortgage on that boat, Mr. Halfhill?

A Not that I know of.

Q Have you ever seen the record of any other mortgage?

A No, sir.

MR. VERMILLE: We object to that, your Honor. If there is another mortgage on the boat the parties should be made parties to this suit.

THE MASTER: Well, he has answered that he did not know.

MR. PHISTER: That is all.

MR. VERMILLE: That is all.

Q BY MR. NIX: At the time this mortgage was given do you know of any other lien or claim upon this boat to the amount of a thousand dollars?

A No, sir.

Q Did you not enter into some kind of an agreement on or about the 6th day of February, 1920, with the Babare Brothers of Tacoma, Washington, relative to the building of this boat?

A We bought the boat from the Babare Brothers.

Q How did you pay for this boat?

A We bought two boats, the "Mountaineer" and the "Western," and the purchase price was \$12,750 each, cash.

Q Did you pay the \$12,750 cash to Babare Brothers for these boats?

MR. VERMILLE: I would like to ask is this cross-examination or is counsel taking the witness on direct?

THE MASTER: He is cross-examining him now. I asked him if he wanted to cross-examine him.

MR. OVERTON: Your Honor, I don't think cross-examination by these parties is proper. They are asserting claims which are paramount to our claim. Our claim cannot affect them in any way if it is allowed. In other words, we come in on a mortgage, while they come in on claims that are paramount to ours. They get the first money out of the boat when it is sold, and

I don't think, under the circumstances, they have a right to contest or question our claims in any way.

THE MASTER: I don't see any objection to their cross-examining him. I think all the parties to a suit have a right to cross-examine a witness put on by anybody. I don't know of any rule of evidence that would prevent that.

MR. OVERTON: I think they have to show some interest in the case to be entitled to cross-examine. As a matter of fact I have no objection to the cross-examination if they will stick to the facts, but I don't want the record cluttered up with a lot of things that are immaterial.

THE MASTER: If you want to cross-examine him I will allow you to do so.

MR. NIX: Well, there is no question about this being a paramount claim. The mortgage is subject to the builder's lien.

THE MASTER: You haven't introduced any evidence to show your claim yet.

MR. NIX: Then I will put the witness on as my witness.

MR. OVERTON: No, we do not admit that the claim of Mr. Nix is a paramount claim.

MR. NIX: Then I will put him on as my witness.

MR. VERMILLE: Before counsel does that, your Honor, I would like to object to it on the ground that the plea is not verified -- the claim -- and move to strike it out.

THE MASTER: Well, now, is it verified or not?

(Counsel and court examine papers).

MR. NIX: Well, if counsel so stipulate I will verify the complaint at this time.

THE MASTER: I will permit you to verify it. I presume you filed it in good faith.

(Mr. Nix signs document.)

THE MASTER: Do you make this witness your witness?

MR. NIX: Yes, I will make him my witness.

C. P. HALFHILL,

recalled as a witness on behalf of the intervener Babare Brothers, testified as follows:

DIRECT EXAMINATION

BY MR. NIX:

Q At the time you entered into this contract with Babare Brothers how much cash did you pay them?

A I think we have a copy of the original instruction that I left there. My memory is not clear on those amounts, but it is on that instruction.

Q The copy says "receipt of \$2000 is hereby acknowledged."

A The arrangement was, when we purchased those boats at those prices, -- you remember the price is \$12,750 each -- well, I know that --

MR. OVERTON: Now, don't testify to anything that is in writing.

Q BY MR. NIX: When you made the final payment was there any amount due to Babare Brothers?

A We instructed the Babare Brothers to collect a certain amount from each fisherman on each boat and

when he had done that to turn the boats over to them and draw on us for the difference.

Q Well, answer the question. Was there an amount due on this boat?

MR. VERMILLE: When?

Q At the time that you made the last payment on this boat. Was there another balance due?

A No. He drew on us for the last payment of the amount of our mortgage.

Q Then the boat was paid for in full at the time of the delivery by you?

A I should think it was, yes sir.

Q But you don't know?

A Well, that was the instruction we left with him.

Q You say the instructions you left with him at the time the boat was to have been delivered by --

A I went up there to Seattle and Tacoma and bought these boats and made the deal and paid a certain payment down, and I came back here and sold them to these fishermen on terms satisfactory to the company, and this mortgage was a part of the purchase price that we had paid in cash and took a mortgage back for \$7,750 on each boat.

Q Is it not a fact that there is another thousand dollars due from the fishermen on this particular boat?

A I learned afterwards that --

MR. OVERTON: Just a minute. We object to that as calling for a conclusion of the witness and hearsay.

THE MASTER: Just testify to what you know of your own knowledge.

Q BY MR. NIX: Do you know of your own knowledge that there was another thousand dollars due on this boat?

A I left Mr. Babare written instructions just what to do and how to handle it.

Q Well, do you know of your own knowledge that there was a thousand dollars due on this boat?

A I heard that the --

MR. OVERTON: Just a minute. I move to strike out the answer.

MR. VERMILLE: Do you know of your own personal knowledge?

MR. OVERTON: We move to strike out the answer as hearsay and as a conclusion of the witness.

THE MASTER: Well, he has not answered the question. I think he started to answer it and you objected. He said he heard. I think your admonition to him to testify only to what he actually knows of his own knowledge is sufficient.

Q BY THE MASTER: You don't know of your own knowledge whether or not this thousand dollars was still due on that boat, do you?

A No.

Q BY MR. NIX: At the time the boat was delivered what instructions did you give to Babare Brothers with reference to the delivery?

A I was a copy of that instruction right there, I think. That will tell it better than I can remember it.

Q Well, now, did you instruct him to collect a thousand dollars from the master of the boat "Mountaineer" before he delivered it?

A I instructed him to collect \$4500.

MR. OVERTON: Just a minute. We object to that. The witness has testified that those instructions were in writing and we want the writing produced or a copy of it. We will furnish a copy if that is satisfactory to counsel.

THE MASTER: Your objection, then, is on the ground that it is not the best evidence?

MR. OVERTON: Yes.

THE MASTER: The objection is sustained. If you have the writing, that is the best evidence.

MR. NIX: If your Honor please, we will make a motion for a continuance on this matter.

MR. OVERTON: As we said before, your Honor, we think the costs ought to be imposed.

THE MASTER: Well, this matter was referred to me to take testimony and to find out what is due, if anything, on that note, and I think the question of costs should be reserved until that time. I was inclined to impose costs because they were not ready for the hearing.

MR. NIX: The only reason we were not ready, your Honor, is that this man was out of the city, and we understood that he was to be back at this time. That is the reason we entered into the stipulation we did.

THE MASTER: When can you be here again?

MR. NIX: Two weeks from today, your Honor.

(Discussion).

(Stipulation dictated by Mr. Phister: It is stipulated between the parties that the San Pedro Grocery & Meat Market Company may introduce further testimony if so advised, and if they do introduce further testimony they shall stand in the same position as Babare Brothers and Rabasa Brothers.)

(An adjournment was thereupon taken until Friday, December 23, 1921, at 2 o'clock P. M.)

* * * * *

EPIFANIO MARIANI,

called as a witness on behalf of San Pedro Grocery & Supply Company, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PHISTER:

Q What is your name?

A Ephifanio Mariani.

Q You are the master and owner of the boat "Mountaineer," are you not, Mr. Mariani?

A Yes, sir.

Q Did you buy during the year 1920 groceries from the San Pedro Grocery & Meat Market, at the end of the year 1920 and the beginning of the year 1921?

A Yes, sir.

Q Were those groceries delivered to that boat?

A All delivered on the boat.

Q What was the total amount in value of those groceries?

A Well, I will tell you the truth, got to order every time, every time go in store give the order.

Q BY THE MASTER: What was the amount?

Q BY MR. PHISTER: How much do you owe the San Pedro Grocery & Meat Market, for groceries you ordered from them for the boat?

A How much order, how much I owe?

Q How much do you owe them?

A What do you mean?

Q How much money do you owe?

A Oh, money you mean?

Q Yes.

A It is about \$338.00, something like that.

Q That is for groceries delivered?

A Yes; \$338. and something, something like that.

MR. PHISTER: That is all.

THE MASTER: He signed some kind of a note here in this case.

MR. PHISTER: That is on behalf of the Marine Hardware Company. I was going to leave him on the stand and take that up on behalf of the Marine Hardware Company, after they crossexamined him about this. I do not care whether I take it up that way now.

MR. VERMILLE: That is all.

MR. PHISTER: I want to call him as a witness for the Marine Hardware Company.

THE MASTER: All right.

MR. PHISTER: I will call him on behalf of the Marine Hardware Company.

EPIFANIO MARIANI,

called as a witness on behalf of the Marine Hardware Company, having been previously sworn, testified on oath as follows:

DIRECT EXAMINATION

BY MR. PHISTER:

Q Mr. Mariani, you bought some stuff from the Marine Hardware Company, didn't you?

A Yes, sir.

Q You bought some nets and things?

A Yes, sir.

Q Were those things delivered on board the boat? Here are some slips. Here is one: "Marine Hardware Co.," sales slip No. 1065, "Sold to Bt. Mountaineer. Address, E. Mariana."

"700 - 6" 50% cork, \$84.00.

3000 - 5" 100% cork, 360.00.

1300 - 4 oz leads, 175.50.

7 Bbl coal tar, 105.00

3 Bbl pine " 67.50.

90 - 6"x5/8 Br.

purse rings, 81.00."

A Yes, sir.

Q "2 coils 1-3/4 manila rope, \$73.80"

A Yes, sir.

Q "57# 70 fath 5/8 Yacht rope, 31.35.

140# 2-3/4 manila rope, 39.90."

Did you order all that stuff from the Marine Hardware Company?

A Yes, sir.

MR. OVERTON: We want to ask counsel to be careful not to lead the witness, not to ask leading questions. I think it is very important in a case of this kind. We are going to ask, if any are, that they not be answered and not considered.

MR. PHISTER: I will try to be careful. I realize I was leading him, and it is a little hard to examine him.

Q Where did you get that stuff, Mr. Mariani?

A In the store.

Q What store?

A The Marine Hardware Store.

Q Where did it go to?

A Go to boat "Mountaineer".

Q Aboard the boat?

A Yes, sir; taken from warehouse, submarine base.

Q From the warehouse at the submarine base?

A Yes, sir.

Q Where did it go to?

A On the boat.

Q Went on board the boat "Mountaineer"?

A Yes, sir.

Q Here is sales slip No. 1064, apparently all for -- well, the total amount is \$5358.03, dated June 14, 1920; did you ever see that before, that sales slip? Is that your signature down there (handing paper to witness)?

A Signed by me, yes.

Q That is your signature?

A That is mine.

Q Where did you get that stuff?

A This was at the submarine base, in the warehouse.

Q Where was it put?

A Put it on boat "Mountaineer".

Q Whom did you order it from?

A From the Marine Hardware Company.

Q Here is another slip, numbered 1. It says, "1 Gal. 357 paint, \$5.25; ½ Gal. of 357 paint, \$2.75; 1 Gal. of tuna red, \$6.00; 2 quarts of tuna red, \$3.30; making a total of \$17.30; is that your signature on the sales slip?

A Yes, sir.

Q Where did you get that from?

A From the store, the Marine Hardware store.

Q Where did it go to?

A To the boat "Mountaineer".

Q What did you do with it?

A For the painting of the boat.

Q You used the paint on the boat?

A Yes, sir.

Q Here is another slip, No. 1509, for "2 coils 3" 3-ply purse line, at \$162.18; 4 coils 12 Man. rope, \$58.58; is that your signature on that?

A Yes, sir.

Q Where did you get that?

A This is stuff taken from the store, the Marine Hardware Store.

Q You ordered it from them?

A Yes, sir.

Q Where was it taken to?

A To the boat.

Q What boat?

A The boat "Mountaineer".

Q It went on board the boat "Mountaineer"?

A Yes, sir.

Q Here is another sales slip, No. 623, 20 ft. of 1" Med. Hose, \$6.00; 1 female end hose cup, 20 cents; 1 Galv. hose band, 10 cents; 1 1" hose nip, 40 cents; 1 1x $\frac{3}{4}$ galvanized red, 35 cents; 8 hooks, \$2.80; 1 kelp hook, \$1.25; 3 loose hooks, \$3.00; 1 8" block, \$1.98, making a total amount of \$16.08; is that your signature on the sales slip?

A Yes, sir.

Q Where did you get that stuff?

A From the store, the Marine Hardware store.

Q You ordered it from the Marine Hardware store?

A Yes, sir.

Q Where did it go to?

A To the boat "Mountaineer".

Q You know it went aboard the boat "Mountaineer"?

A Yes, sir.

Q Of your own knowledge?

A Yes, sir.

Q Here is another sales slip, No. 607; one brass fog horn, \$1.50; 18 2 brass rings, \$2.70; 2 $\frac{1}{2}$ " long links, \$.40; "making a total of \$4.60.

A That is small stuff.

Q You signed that?

A Yes, sir.

Q That is a total of \$4.60; you signed that sales slip?

A Yes, sir.

Q Whom did you order that from?

A The Marine Hardware store.

Q Where did it go to?

A Aboard the boat.

Q The boat "Mountaineer"?

A Yes, sir.

Q Here is another slip, bearing No. 1058; "15# waste, \$3.75; 6 - 40-watt, 15-volt bulbs, \$2.40; 4 bulb shields, \$2.60," making a total of \$8.75.

A Yes, sir.

Q You signed that sales slip, did you?

A Yes, sir.

Q That is your signature?

A Yes, sir.

Q Whom did you order that from?

A I ordered it from the Marine Hardware Store.

Q Where was that delivered?

A Delivered on board the boat "Mountaineer".

Q It was delivered on board the boat "Mountaineer"?

A Yes, sir.

Q Here is another sales slip, No. 1070; "2 boxes of cartridges, 30-30, \$3.20; 3 Elec. bulk shields, \$.90; making a total of \$4.10.

A The cartridges is all right.

Q You signed that; that is in your handwriting?

A Yes, sir.

Q Did you order that from the Marine Hardware Company's store?

A Yes, sir.

Q Was that delivered on board the boat "Mountaineer"?

A Yes, sir.

Q What did you use it for?

A For the boat.

Q You took it aboard and kept it aboard the boat?

A Yes, sir.

Q Here is another slip, numbered 2269; "four links, \$3.00; 5 long links, \$1.00; 3 doz. 1-1/4" Galv. rings, \$1.20;"

A Yes, sir.

Q "2 6" long pat blocks, \$3.60."

A Yes, sir.

Q 2 No. 7 Galv. eye blocks, \$.50."

A Yes, sir.

Q "1 vise, \$6.50."

A Yes, sir.

Q Making a total amount of \$15.80. You signed that slip too?

A Yes, sir.

Q Where did you order that from?

A The Marine Hardware store.

Q Where was that taken to?

A On board the boat "Mountaineer".

Q It went on board the boat "Mountaineer"?

A Yes, sir.

Q Here is another sales slip, No. 1003; "1 pr port \$.75; 1 only $\frac{3}{4}$ close Galv. nipple, \$.07."

A Something for a pump.

Q "1 female end 1" hose connection, \$.25."

A Yes, sir.

Q "1 only 1" to $\frac{3}{4}$ Galv. nipple \$.35.

A That is small stuff going on the boat.

Q "1 only oil apron, \$1.85."

A Yes, sir.

Q Total amount is \$3.27. You signed that one too?

A Yes, sir.

Q Where did you order that stuff from?

A The Marine Hardware store.

Q Where was it delivered to?

A To the boat "Mountaineer".

Q Here is another sales slip, No. 978; 2- $\frac{1}{2}$ # Mobiline packing, \$5.00."

A Yes, sir.

Q You signed that one too?

A Yes, sir.

Q Did you order that from the Marine Hardware Company?

A Yes, sir.

Q And that was also delivered aboard the boat "Mountaineer"?

A Yes, sir.

Q Here is another sales slip, No. 918; "30# #30 Med. twine, \$26.40; 50# #21 Med. twine, \$44.00; total,

\$70.40." Did you order that from the Marine Hardware Company?

A. The Marine Hardware Store.

Q Where to?

A For the boat "Mountaineer".

Q And it was delivered to the boat "Mountaineer"?

A Yes, sir.

Q Here is another sales slip, No. 1349; "25# of twine, \$22.00;" do you know what that is? 25 pounds of some kind of twine, it looks like, at 88 cents, \$22.00.

A Yes; that was ordered from the Marine Hardware Store for the boat "Mountaineer".

Q And it was delivered on board the boat "Mountaineer"?

A Yes, sir.

Q All this stuff that is included in the slips that I have been asking about, was that used by you on the boat "Mountaineer"?

A Yes, sir.

Q And all used by the boat "Mountaineer"?

A Yes, sir.

Q And is still on board if it has not been worn out?

A Yes, sir.

Q Do you remember signing a note?

A Yes, sir.

MR. PHISTER: We approved this note; that apparently is his signature. That is all.

THE MASTER: Cross-examine.

CROSS-EXAMINATION

BY MR. VERMILLE:

Q Mr. Mariani, are you the owner and master of this boat "Mountaineer"?

A Yes, sir.

Q Where did you get the boat from?

A The boat?

Q Yes.

A From Tacoma, Babare Brothers.

Q When?

A The 3rd.

Q What was the boat built for?

A Tacoma.

Q What was the boat built for?

A The fishing business.

Q What do you call boats of this kind? What are they commonly called; what do you call them?

A Come from Tacoma.

Q What do you call the boats, like your boat?

A You mean name?

Q Yes.

A "Mountaineer."

Q BY THE MASTER: What kind of boat is it?

Q BY MR. VERMILLE: What kind of boat is it, a steamer?

A No; gasoline. I understand broken. I tell truth. Gasoline, 50 horse-power.

Q Do you call this a motor boat?

A What is it?

Q Do you call this a motor boat?

A This is gasoline.

Q A sail boat or a yacht or what?

A No; gasoline boat. This is a fishing boat.

Q Ever called a purse seine boat?

A Yes; purse seine boat, what they call it. I don't know what you mean.

Q How is the boat constructed?

MR. PHISTER: I object to the question as improper cross-examination at this time.

A Wait a minute. You don't know no better than I do. This is 1920.

MR. VERMILLE: Read the question.

(Question read.)

Q How is it built?

A How is it built?

Q Yes; how is it built?

A I don't know what you mean -- is built for purse seine, this boat; this built for fishing business.

Q It is built for fishing business?

A Yes, sir; sure.

Q Could you go out and fish with this boat and use it as a purse seine boat, without a net?

A No.

MR. PHISTER: That is objected to as incompetent, irrelevant and immaterial, not proper cross-examination.

THE MASTER: Objection overruled.

A That is not the same as you go with boat; it is not net, can't go out.

Q BY MR. VERMILLE: What did you intend to do with this boat?

A What is it?

Q When you bought it, what was it built for?

A Have to make a living, for business.

Q Does a purse seine boat have to be constructed in any particular way to handle the nets?

A Well, I make for purse seine boat, make boat for purse seine line, for fishing for tuna, for tuna or for something else.

Q Where were you, up at Tacoma at the time they were building this boat?

A No; built in - - buy before; make - - what do you that, I buy boat. I need boat, because I am not here; right there; I buy in other state, Arizona; my brother buy boat for me; he buy boat for me. I come here. I go to north.

MR. VERMILLE: I think I asked him what it was built for.

THE MASTER: He said it was for fishing, to make a living.

Q BY MR. VERMILLE: Could you have used the boat for what it was built for without a net?

MR. PHISTER: That is objected to as incompetent, irrelevant and immaterial.

A No; because for my business it can use no net.

MR. PHISTER: Necessarily it is for fishing.

THE MASTER: I overrule the objection. Answer it.

MR. VERMILLE: Read the question.

(Question read.)

MR. PHISTER: It is also objected to as calling for a conclusion of the witness.

THE MASTER: Objection overruled.

A I like it here, very plain talk. I don't know plain talk. This the big question here.

Q BY MR. VERMILLE: You don't understand my question.

A No; the whole business.

THE MASTER: I don't think he understands you.

Q BY MR. VERMILLE: Did you buy this boat to fish for tuna?

A Yes, sir.

Q Could you have got tuna with this boat without a net?

A No.

Q What kind of a net; what kind of a net do you use?

A Purse seine.

Q Had this boat ever been used for fishing before you bought it?

A No, sir; it is a new boat.

Q A new boat?

A Yes, sir.

Q Did it have a net on it at the time you bought it, in Washington.

MR. PHISTER: That is objected to as incompetent, irrelevant and immaterial; it is immaterial; there is no pleading here setting up any defense other than the denial of our account. It is not really a denial of our account, but it is simply a statement to put

us on our proof, neither admitting nor denying it. It is apparent he is setting up here a special defense.

MR. VERMILLE: He is setting up, stating that he has a maritime libel on it, and we have a right to rebut that.

THE MASTER: Have you attempted to show the net wasn't necessary for the boat or already provided with a net?

MR. VERMILLE: No, that is not what we intend to show. We intend to show that the net was necessary to be used for the boat, that it was intended for it.

THE MASTER: Do you intend to show that there was a net already provided on the boat, that the purchase of this net at this time was not necessary?

MR. VERMILLE: We maintain that this was a brand-new boat; that the net was furnished to this new boat and never had been in business before.

THE MASTER: You claim what was furnished in the original construction of the boat is not subject to a lien at this time.

MR. VERMILLE: Yes.

MR. PHISTER: We maintain that has to be pleaded as a special defense.

THE MASTER: Objection overruled.

CROSS-EXAMINATION

BY MR. OVERTON:

Q When you got the boat in Tacoma, did you come right down to San Pedro with it?

A No; I stop at 'Frisco first.

Q You went to 'Frisco?

A Yes, sir.

Q What did you do in 'Frisco?

A What?

Q I say, what did you do in 'Frisco?

A Stopped in a shop down there, Standard shop.

Q To have some work done?

A Yes, sir; the fly-wheel - -

Q Well, you had some work done?

A Yes, sir.

Q You did not use this boat for fishing until you got to San Pedro?

A No.

Q As soon as you got to San Pedro you went and bought this net?

A Yes.

MR. PHISTER: That is objected to as incompetent, irrelevant and immaterial.

Q BY MR. OVERTON: This purse seine net?

A Yes, sir.

THE MASTER: Objection overruled.

Q BY MR. OVERTON: Then when you got the net you went out tuna fishing?

A No.

Q What did you do after you got the net? You got the net and you put it on the boat?

A Yes, sir.

Q Then you went fishing with the net?

A Yes, sir; go fishing; sure.

Q A purse seine boat like this one is built different from the ordinary fishing boat, isn't it?

A The same thing, I guess.

Q It has got a different kind of winch on it, hasn't it?

A Yes, sir.

Q It has got a big platform on it for a net?

A Yes, sir.

Q A big, broad stern to hold the weight of the net?

A Yes, sir.

Q And the bulwarks?

A Yes, sir.

Q It is built for a big purse seine net?

A Yes, sir.

Q This boat?

A Yes, sir.

Q Where is this net now?

A The net?

Q Yes.

A I expect to have it two years; net is no good; is rotten.

Q Where is it?

A Net is something you put in the water; no good.

Q Answer my question. Where is the net?

THE MASTER: Q Where is the net now?

A Now, I no have it; net put down, down on submarine base, on the bank, leave there, to dry for fixing up, to make dry; the net is all rotten; because I am going to have it for company, the net is left there.

Q BY THE MASTER: Where is that net now?

A Somebody taken off; somebody has taken off, a little down on the bank; somebody take for chicken

yard. A little bit, some is good net, is put on the skiff. The skiff got dumped, broke loose, the whole business. Some is good. The cork, some no good; and somebody come there and steal cork. I tell you the truth.

Q All I want to know is where the net is. You don't know where it is?

A I told you where is net.

Q BY MR. OVERTON: You sold the cork?

A Sold cork; sell it for \$75.00.

Q Where are the corks?

A A young man take off; I don't know where he go.

Q Where were the corks when you sold them?

A What?

Q I say, where were the corks when you sold them?

A Sell it.

Q Where were they when you sold them?

A Come in man down there, if I want to sell them old corks, and I better sell it then leave it down there.

Q Where did you last see this net; where was it when you last saw the net?

MR. PHISTER: I object to that as incompetent, irrelevant and immaterial.

A Last see it down there in submarine base.

THE MASTER: Objection sustained.

A Somebody live there; somebody take it for chickens, for yard, for fence for chicken.

MR. OVERTON: For this purpose we will make the witness our witness.

Q What did you do with the net line?

A Young man sell it for money.

Q Sold the cork and sold this?

A Somebody put in skiff, come in night time, break line, skiff run up all loose.

Q Where was the net when you last saw it?

A What?

Q Where was the net the last time you saw it?

A Down at the submarine base the last time, looking for it, making dry down there, have to make dry or net be no good, just like silk. Where I go, go in house, no money to pay eats, no money for net.

Q One night, this net you remember on dock of Halfhill Packing Company, on the wharf; do you remember that?

A What?

Q Do you remember this net a long time on wharf of the Halfhill Packing Company, do you remember that?

A Yes, sir.

Q You took it away from there?

A Sure I take it away from there.

Q One night you got it?

A No, not night; got there eight o'clock. I have witnesses there, eight o'clock down there.

Q Eight o'clock in the morning?

A Yes, sir.

Q Whom have you got as a witness?

A I got witnesses. Joe Borisich.

Q Now let me see --

MR. PHISTER: It is understood the same objecting and the same ruling goes to all this line of questioning.

A Andrew Mariani.

THE MASTER: I don't see the materiality of it.

MR. OVERTON: It is not material in this case. We are going to ask to have it go in anyway, and the reason for it I will explain to you: We have a chattel mortgage on that net, and this witness evidently disposed of it.

THE MASTER: The objection will be sustained, but I will allow it to go in for the purpose of the record. Go ahead.

Q BY MR. OVERTON: What is the name of the witness?

A I don't know exactly what his name is.

Q You don't know the name of the witness?

A No; I ask for no name.

Q Do you know where he lives?

A No, I don't know; I don't know where he live.

Q You don't know where he lives?

A No.

Q Who was with you when you took this net away from the Halfhill wharf?

A What you ask for net? I don't know what you say.

Q I say, when you took this net away from the Halfhill wharf, who was with you?

A With me?

Q Yes. Now answer my question: What men were with you; what men helped you?

A Five men.

Q What were their names?

A His name? I don't know his name.

Q You don't know the name of any one of them?

A I know names, sure.

Q Tell me the name.

A His name is Jimmie Mariani and Frank Mariani.

Q Those two helped you?

A And Andrew Mariani gave me help.

Q Were they all a part of the crew of this boat?

A Yes, sir. I pay to give me help.

Q Where did you take the net? When you took the net from there, from the Halfhill place, where did you go?

A I put on the ground to make dry, two or three times I try to make it dry, to make net dry, to fix it up, then put in warehouse; look no good, leave alone.

Q You were going to put it in the warehouse?

A What?

Q I say, you were going to put it in the warehouse?

A I fix it up. I know sure good net, after cleaning up in other place, other property.

Q What warehouse were you going to put it in?

A Not put in warehouse; on the bank.

Q You intended to put it in the warehouse after fixing it up?

A Let them fix up some place, to put in warehouse or something else, some place.

Q Where did you intend to put it when you got it fixed up?

A Find place for renting it. Net no good. No find it.

MR. OVERTON: That is all.

MR. PHISTER: That is all.

MR. NIX: On behalf of Rabasa Brothers we make this witness our witness.

EPIFANIO MARIANI,

a witness called on behalf of Rabasa Brothers, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIX:

Q Where were you on or about the 30th day of March, 1920?

A What did you say?

Q Where were you about the 30th day of March, 1920?

A To buy groceries.

Q At Rabasa Brothers in Tacoma, Washington.

A Yes, sir.

Q I will show you these sales slips from Rabasa Brothers Company, Incorporated, general merchandise, Tacoma, 2424 North 30th Street, Gig Harbor, slips Nos. 33, 34, 35, 36, 37, 38, 39, 40 and 44, and slips numbered 1, 2, 3, 4, 5, and 6, and I will ask you to look over these slips and tell the court whether or not you ordered the supplies from Rabasa Brothers.

A Yes, sir; I buy in store.

Q You ordered them in the store?

A Yes, sir.

Q Where were the supplies delivered?

A Delivered to Nick.

Q Where were they delivered to?

A On the boat "Mountaineer".

Q Delivered on the boat "Mountaineer"?

A Yes, sir; in an auto.

Q These supplies were used for the purpose of your intended trip, trip from Tacoma, Washington, to San Pedro, California?

A Yes, sir; from Tacoma, Washington, to San Pedro, California.

Q Now with reference to the store; first, where is the store located; near the wharf?

A No; it is about two blocks.

Q Two blocks?

A Two blocks.

Q Can you see the boat from the store practically?

A What?

Q Can you see the boat from the store practically?

A No, cannot see store; wharf like that, one block up and one go this way (indicating).

Q You look those over, each slip, each item, and tell the court whether or not you actually received this amount of goods from Rabasa Brothers and if same were delivered on board the boat "Mountaineer"?

A Yes, on board; bring them aboard.

Q How much do you as captain of the boat, "Mountaineer", or does the boat "Mountaineer", owe Rabasa

Brothers, for merchandise or supplies furnished the boat?

MR. VERMILLE: If your Honor please, I desire to object - - that is all right; he can answer how much.

A That is supplies, for supplies in the kitchen?

MR. NIX: How much money do you owe them, or does the boat?

A \$481. something, something like that money.

Q None of this was paid to Rabasa Brothers?

A No; I pay no penny.

MR. NIX: I would like to offer these as exhibits A and B of Rabasa Brothers.

THE MASTER: Let them be received and marked Rabasa Brothers Company Exhibits Nos. 1 and 2.

MR. NIX: That is all.

MR. PHISTER: That is all.

MR. VERMILLE: That is all.

THE MASTER: Do you want to cross-examine?

MR. VERMILLE: No.

MR. NIX: In the case of Babare Brothers I will make him my witness.

THE MASTER: I thought that was Babare Brothers.

MR. NIX: That was Rabasa Brothers.

THE MASTER: Let him take the stand again.

EPIFANIO MARIANI,

called as a witness on behalf of Babare Brothers, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIX:

Q How much did you contract to pay for the boat "Mountaineer"?

A Contract for five thousand, my contract.

Q How much?

A The whole pay, \$12,750.00.

MR. PHISTER: We object to the introduction of any testimony on this claim, because it doesn't state facts sufficient to constitute a libel.

MR. NIX: It is a claim.

THE MASTER: I overrule the objection at the present time. You may thrash it out later on.

MR. NIX: Read the question.

(Question read.)

A \$12,750.00.

Q Who built this boat "Mountaineer"?

A Babare Brothers.

Q Of Tacoma, Washington?

A Yes, sir.

Q How much, if anything, do you owe Babare Brothers on the insurance?

A Babare Brothers - -I don't know.

Q Didn't they obtain the insurance for you when you came down to San Pedro?

A I don't know.

Q How much, if anything, do you owe Babare Brothers on account of the building of this boat?

A \$1,000 to be more, I pay.

Q And there is \$1,000. due Babare Brothers on

account of the boat "Mountaineer", for the building of the same?

A I don't understand you.

Q There is \$1,000. due Babare Brothers on account of the building of the boat "Mountaineer"?

A Yes, sir.

MR. OVERTON: We object to that as leading.

THE MASTER: Objection sustained. Ask him what is the balance due.

MR. NIX: I did, your Honor; and that was just merely repetition. He stated that there was a little over \$1,000. due. I wanted the amount more clearly for the benefit of the record.

THE MASTER: Repeat that question. Ask him what the balance was.

Q BY MR. NIX: What is the balance due Babare Brothers on account of the building of the boat, on account of building it, approximately?

A The balance, you mean to pay more?

Q For the building of the boat.

A Altogether?

Q Yes.

A No.

Q No, the balance that is not paid?

A \$1,000.

Q \$1,000?

A Is not paid; yes, sir.

MR. NIX: That is all.

THE MASTER: Now you can cross-examine.

CROSS-EXAMINATION

BY MR. VERMILLE:

Q Did you buy that boat from Babare Brothers or the Halfhill Packing Company?

A What?

Q Did you buy it from the Halfhill Packing Company?

A Babare Brothers.

Q I don't believe you understood what I said. Did you have a contract with the Halfhill Packing Company?

A Yes, sir.

Q To buy this boat?

A Well, I don't know what you mean.

Q Did you have a contract with the Halfhill Packing Company to buy this boat?

A No; just get me for boat \$7,750; I buy it.

Q Did you buy the boat from the Halfhill Packing Company or from Babare Brothers?

A From Babare.

Q Whom did you buy the boat from?

A From Babare.

Q Did you have a contract with the Halfhill Packing Company to buy the boat from them?

A No, I have no contract, because, I tell you before, I am not here; my brother buy boat for me.

Q Whom did he buy the boat from, the Halfhill Packing Company?

A He make contract for fishing for me.

Q For whom?

A For the Halfhill Packing Company, draws 7,000 --

Q Now, wait a minute. He made the contract with the Halfhill Packing Company to fish, did he?

A Yes, sir.

Q Who was going to buy the boat, the Halfhill Packing Company or he?

A I am, I guess.

Q Did he have any money to buy the boat with, if you know?

A Give him \$7,000.

MR. VERMILLE: Suppose we save time, if your Honor please.

Q I ask you if that is your signature.

A This is my brother's, buy for me.

Q Bought it from you?

MR. PHISTER: Bought it for you.

MR. VERMILLE: We will introduce the contract in evidence and ask leave to withdraw it.

THE MASTER: Read it in evidence, if you want to. It will be introduced and you can read it into the record and withdraw it.

Q BY MR. VERMILLE: Is that your

A No, because no write, my brother, he don't write, he cannot write, my brother.

(Short interruption.)

THE MASTER: Proceed, Mr. Vermille.

Q BY MR. VERMILLE: Do you know whose signatures those are?

A No.

Q Do you know those people?

A No.

Q You say your brother bought the boat?

A Yes, sir; for me.

Q From the Halfhill Packing Company.

A Told him to buy for me. I don't know where he buy. I know him buy from Babare Brothers.

Q You did not buy the boat yourself; your brother bought it for you?

A My brother buy for me.

Q Your brother bought it for you?

A Bought for me. I buy from Babare Brothers.

Q Just a minute now.

A All right.

THE MASTER: Just a minute. Let me ask you a question. Who made the contract with Babare Brothers to build the boat?

A I guess nobody.

Q Nobody?

A No; I guess, just Babare Brothers built for themselves.

Q Who made this agreement that is set out in your libel?

A I don't know, agreement for making. I know my brother make contract just for me, before coming in to San Pedro, Halfhill Packing Company make contract, done it for me.

THE MASTER: The specifications you set out here in your agreement is signed by the Halfhill Packing Company and Nick Babare; is that the specification for the building of this boat?

MR. NIX: As I understand it, that is the specification for the building of that boat, and the agreement leading up to it, I don't know anything about that.

THE MASTER: I thought usually the specifications were signed by the same party that signed the contract for the boat. That is what you set out here -- the Halfhill Packing Company.

MR. NIX: We maintain there is \$1,000 due for the building of the boat. We put this witness on the stand to prove that there is \$1,000 due Babare Brothers for the building of this boat.

THE MASTER: All right. Proceed.

MR. VERMILLE: That is all.

CROSS EXAMINATION

BY MR. PHISTER:

Q At the time you got that boat, were there any knives or forks aboard it when you first got her?

A What is it?

Q Where was the boat delivered to you, Mr. Mariani; where did you first go aboard the boat?

A What do you mean?

Q On the boat "Mountaineer"?

A Go first?

Q Where did you first go aboard the boat "Mountaineer"? What I mean is, was it in San Pedro or up north?

A Built in the north.

Q Is that when you first went aboard her?

A Yes, sir; first went aboard her, right south of Babare Brothers.

Q Were there any cooking utensils aboard her at all?

A No, sir; nothing at all; it was all empty, all empty.

MR. PHISTER: That is all.

MR. VERMILLE: That is all.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE	:	
COMPANY, a Corporation,	:	
Libellant,	:	
	:	
VS.	:	
	:	
GASOLINE LAUNCH	:	BOND ON APPEAL
"MOUNTAINEER,"	:	AND TO STAY
Respondent,	:	EXECUTION.
	:	
HALFHILL PACKING	:	
CORPORATION, a Cor-	:	
poration, et al,	:	
	:	
Intervenors.	:	
	:	

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and duly organized to transact a surety business in the State of California,

is held and firmly bound unto *unto* the Halfhill Packing Corporation, a Corporation, to Babasa Brothers Company, a Corporation, and to Mitchell Marincovich, et al, doing business under the firm name and style of the San Pedro Grocery and Meat Market, their heirs, executors, administrators and assigns in the sum of Two hundred and fifty dollars (\$250.00) for the payment of which sum well and truly to be made, the undersigned acknowledges itself just bound.

The condition of the above obligation is such that whereas the Marine Hardware Company, a Corporation, *appellant* herein, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the District Court of the United States for the Southern District of California, bearing date of 18th August, 1922, rendered in the above entitled cause, in which the said Marine Hardware Company, a Corporation, is the libellant, and the said Halfhill Packing Corporation, a corporation, and others are interveners against the said Gasoline Launch "Mountaineer."

NOW, THEREFORE, if the above named appellant, Marine Hardware Company, a Corporation, shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect, and

WHEREAS, the said Marine Hardware Company, a Corporation, desires, during the process of such appeal, to stay the execution of the said decree of the

District Court, which said decree orders the said Gasoline Launch "Mountaineer" to be sold.

NOW, THEREFORE, the undersigned, the said Fidelity and Deposit Company of Maryland, does hereby acknowledge itself to be held and firmly bound unto the said parties hereinabove first named, their heirs, executors, administrators and assigns, in the further sum of Fourteen thousand, seven hundred and fifty dollars (\$14,750.00), for the payment of which sum well and truly to be made, it acknowledges itself justly bound.

The condition of said obligation is such that if the above named *appellant*, Marine Hardware Company, a Corporation, shall abide by and perform whatever decree may be rendered in this case by the Circuit Court of Appeals of the United States for the Ninth Circuit (to which court said appeal is taken), or on the mandate of said Circuit Court of Appeals by the court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated this 25th day of August, 1922.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND

By W M Walker

ATTEST:
R. W. Stewart

Its Attorney in fact.

Agent.

Examined and recommended for approval as provided in rule 29.

LOUCKS & PHISTER,
By Montgomery Phister

Proctors for Appellant.

I hereby approve the foregoing bond.

Dated the 25 day of Aug 1922

Trippet
Judge or Clerk

State of California, }
County of Los Angeles. } ss.

On this 25th day of August, 1922, before me, 28th I. C. Swain, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and R. W. Stewart known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent, respectively.

(Seal)

I. C. Swain

Notary Public in and for the State of California,
County of Los Angeles.

[Endorsed]: No. 1027 IN THE United States District Court Southern District of California Southern Division MARINE HARDWARE COMPANY, a Corporation, Libellant *vs.* GASOLINE LAUNCH

"MOUNTAINEER" Respondent, BOND ON APPEAL AND TO STAY EXECUTION. FILED AUG 28 1922 CHAS. N. WILLIAMS, Clerk By L. J. Cordes *Received copy of the within..... this.....day of.....192...*

.....*Attorney.. for Libellants*
LAW OFFICES LOUCKS & PHISTER MARINE BANK
BUILDING SAN PEDRO, CALIFORNIA *Attorneys*
for Libellant

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

o o o o o o o o o o o o o o o o o o

MARINE HARDWARE	:	
COMPANY, a corporation,	:	
Libellant,	:	
VS.	:	
	:	
GASOLINE LAUNCH	:	
"MOUNTAINEER,"	:	NOTICE OF APPEAL
Respondent,	:	
	:	
HALFHILL PACKING	:	
CORPORATION, a Cor-	:	
poration, et al,	:	
Intervenors.	:	

To the Halfhill Packing Corporation, a Corpora-
tion, and to Messrs. Overton, Lyman & Plumb, its
proctors; and to Babasa Brothers Company, a Cor-
poration, and to Messrs. Smith & Nix, their proctors;
and to Mitchell Marincovich, et al, co-partners, doing

business under the firm name and style of the San Pedro Grocery and Meat Market, and to A. L. Baldwin, their proctor; and to Charles N. Williams, Esquire, Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division. You and each of you will please take notice that the Libellant, Marine Hardware Company, a Corporation, hereby appeals from the Final Decree made and entered herein on the 18th day of August, 1922, and from the whole thereof to the next United States Circuit Court of Appeals for the Ninth Circuit to *the* holden in and for said Circuit at the City of San Francisco, in the Northern District of California.

Dated this 25th day of August, 1922.

LOUCKS & PHISTER,

By Montgomery Phister

Proctors for Libellant.

[Endorsed]: Original No. 1027 In Adminalty IN THE United States District Court Southern District of California Southern Division MARINE HARDWARE COMPANY, a Corporation, Libellant *vs.* GASOLINE LAUNCH "MOUNTAINEER" Respondent NOTICE OF APPEAL. Received copy of *the within* notice this 25 day of Aug 1922. Smith and Mix Overton, Lyman & Plumb A. W. Baldwin, FILED AUG 25 1922 CHAS. N. WILLIAMS, Clerk By W. J. Tufts Law offices LOUCKS & PHISTER Marine Bank Building San Pedro, California. Attorneys for Libellant

IN THE DISTRICT COURT OF THE UNITED
STATES, IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE	:	
COMPANY, a corporation,	:	
Libellant and Appellant,	:	
VS.	:	
GASOLINE LAUNCH	:	STIPULATION FOR
"MOUNTAINEER,"	:	RECORD ON
Respondent,	:	APPEAL
HALFHILL PACKING	:	
COMPANY, a Corpora-	:	
tion, et al,	:	
Appellees.	:	

WHEREAS, the Appellant desires to review particularly the decision of the District Court holding that a part of the materials and supplies furnished by the Marine Hardware Company, a Corporation, were a part of the original equipment of the gasoline launch "Mountaineer," and, therefore, the said Marine Hardware Company did not have a Maritime Lien for a part of the materials and supplies so furnished and delivered, and

WHEREAS, a great part of the record and of the evidence introduced in the lower court has no bearing upon the question, and

WHEREAS, it is the desire of the parties hereto to shorten the record as much as is consistent with the presenting of the matter above referred to,

IT IS THEREFOR STIPULATED AND AGREED that the record on appeal shall contain only the following papers and testimony: The Libel of the Marine Hardware Company, a Corporation, and the monition issued thereon; the libel in intervention of the Halfhill Packing Company, a Corporation, the order for reference, the findings of fact and conclusions of law of the Special Master, the Notice of filing the Special Master's Report, the exceptions to the report of the Special Master filed on behalf of the *Libelant*, the Order overruling the exceptions to the Report of the Special Master, the opinion of the Court thereon, this Stipulation, the assignment of errors, and the following testimony:

The testimony of C. E. Taylor, the testimony of Roger Clark, the testimony of E. Mariani, the testimony of C. P. Halfhill and all of the exhibits introduced by either party during the testimony of said witnesses including the contract between the Halfhill Packing Company and the Intervening *Libelant*, Barbara Brothers, for the building of the vessel, and

IT IS FURTHER STIPULATED, that the following parts of the record may be omitted:

Order continuing return day, order allowing intervention of San Pedro Grocery & Meat Market, libel in intervention of Rabasa Brothers, libel in intervention of Babara Brothers Company, notice of motion for reference, order of submission and the following testimony:

L. S. Nix, August Felando, Paul Bogdanich, and the testimony of Anton Briagevich, together with the exhibits introduced by any party during their testimony. It is understood and stipulated that the matters and things excluded from the record do not have any bearing upon the libel of the Marine Hardware Company, a Corporation, and further, that the record contains full, true and correct statement of all the pleadings, orders, decrees, opinions and testimony in any way *effecting* the libel of the Marine Hardware Company, a Corporation, and the defense made thereto by the Halfhill Packing Company, a Corporation, towit: That said materials and supplies consisting of the purse *sein* net so furnished were in effect materials and supplies which constituted a part of the original equipment of said vessel to enable it to enter upon the kind of business and navigation intended and therefor not a maritime lien.

Dated this 23rd day of October, 1922.

Smith and Nix

Loucks & Phister

A. L. Baldwin

Overton Lyman & Plumb

S. K. Vermille

[Endorsed]: Original. No. 1027 IN THE United States District Court Southern District of California Southern Division MARINE HARDWARE COMPANY, a Corporation, *Libelant* and Appellant. vs. GASOLINE LAUNCH "MOUNTAINEER" Respondent, HALFHILL PACKING COMPANY, a Corporation, et al Appellees. STIPULATION FOR RECORD ON APPEAL FILED OCT 25, 1922 CHAS. N. WILLIAMS, Clerk By L. J. Cordes.

IN THE DISTRICT COURT OF THE UNITED
STATES IN THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE COM-)	
PANY, a corp.,)	
	)	Libellant,
)	
vs)	
GASOLINE LAUNCH "MOUN-	)	PRAECIPE.
TAINER")	
	)	Respondent,
RABASE BROS. CO., et al.,)	
	)	Intervenors

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

Please prepare certified record on appeal to the Circuit Court of Appeals for the Ninth Circuit in the above entitled action, said record to include judgment roll, etc., as per stipulation signed by all the parties and filed herein. Include therein all papers and testimony named in said stipulation.

Dated this 18th day of October, 1922.

Loucks & Phister

Proctors for Libellants.

[Endorsed]: No. 1027. IN THE UNITED STATES DISTRICT COURT Southern District of California Southern Division MARINE HARDWARE COMPANY, a corporation, Libellants, vs. GASOLINE LAUNCH "MOUNTAINEER" RESPONDENT, PRAECIPE. FILED OCT 25 1922 CHAS. N. WILLIAMS, Clerk. By L. J. Cordes. LAW OFFICES LOUCKS & PHISTER MARINE BANK BUILDING SAN PEDRO, CALIFORNIA Attorneys for Libellant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION,
IN ADMIRALTY.

MARINE HARDWARE COM-)	
PANY, a corporation,)	
Libellant and Appellant,)	
vs)	
GASOLINE LAUNCH "MOUN-	)	CLERK'S
TAINER"	)	CERTIFICATE
Respondent,)	
)	
HALFHILL PACKING COR-)	
PORATION, a corporation,)	
Claimant and respondent.)	
)	
)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing pages, numbered from 1 to inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the libel, monition, libel in intervention, minute order referring cause to special master, findings of fact and conclusions of law, notice of signing and filing report, exceptions, points and authorities on exception, minute order overruling exceptions, final decree, opinion, assignment of errors,

testimony C. E. Taylor, Roger Clarke, Charles P. Halfhill, Epifanio Mariani; bond on appeal, notice of appeal, stipulation for record on appeal and praecipe.

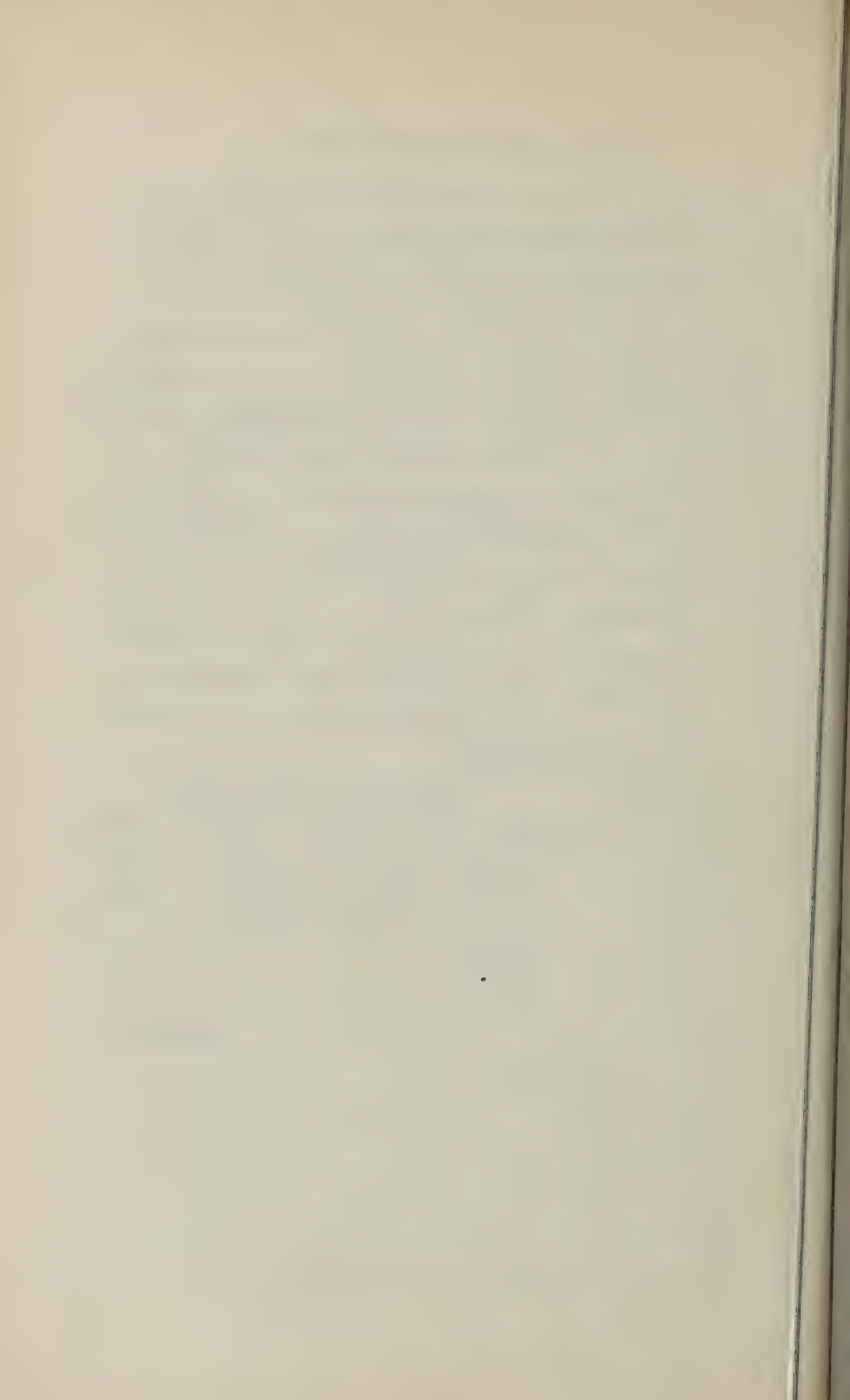
I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Corporation,

Appellant,

vs.

Halfhill Packing Company, a Corporation,

Appellee,

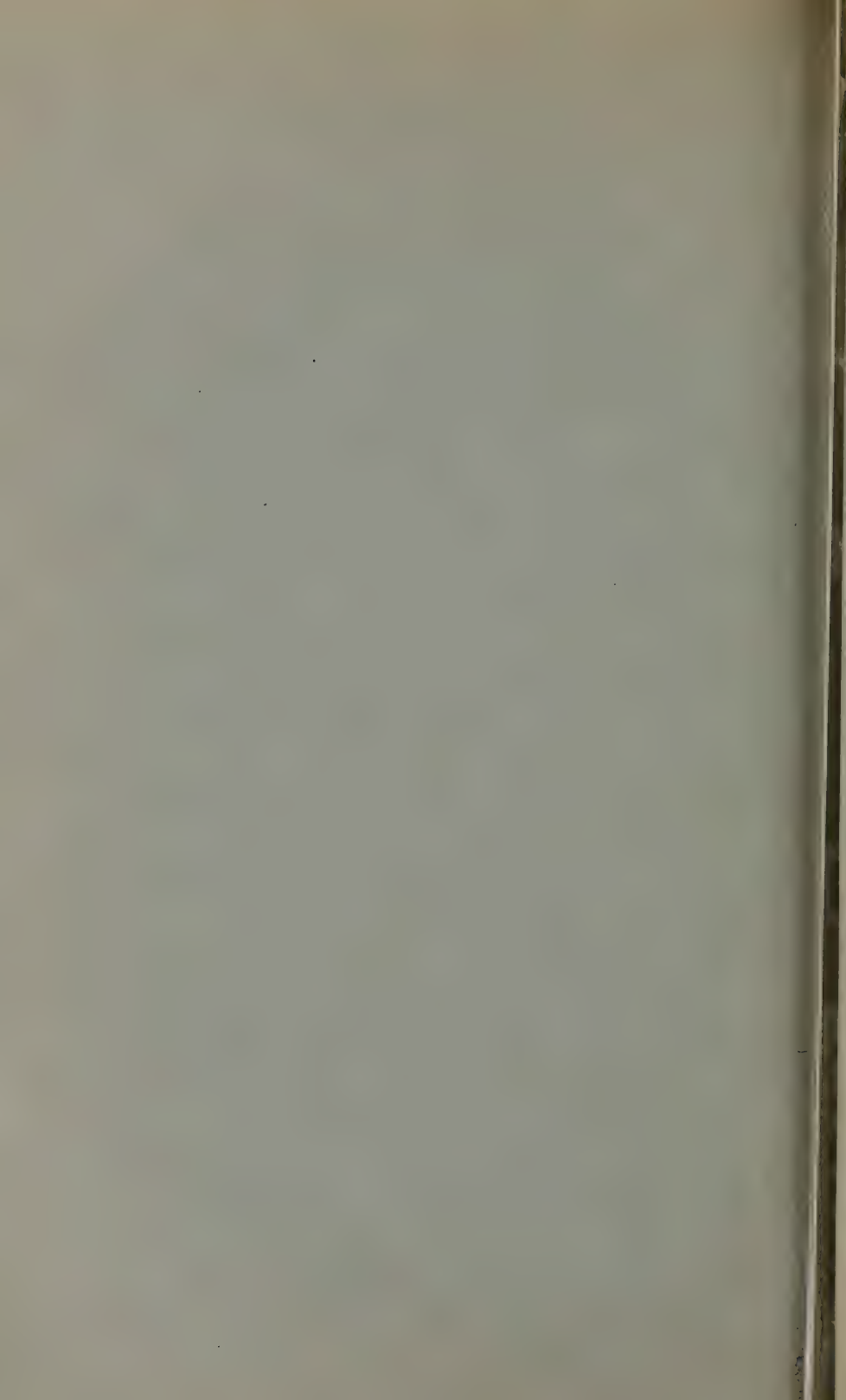
Gasoline Launch "Mountaineer,"

Respondent.

APPELLANT'S OPENING BRIEF.

LOUCKS & PHISTER,

Proctors for Appellant.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Corporation,

Appellant,

vs.

Halfhill Packing Company, a Corporation,

Appellee,

Gasoline Launch "Mountaineer,"

Respondent.

APPELLANT'S OPENING BRIEF.

This is an action *in rem* against the gasoline launch "Mountaineer."

The vessel was built at Tacoma, Washington, in the year 1920, under contract for the Halfhill Packing Company, a San Pedro corporation. She was completed in the early spring of 1920 and thereupon the Halfhill Packing Company sold her to one Mariani, while she was still at Tacoma, Washington, receiving a part of the purchase price in cash, the balance represented by a first mortgage on the vessel of seven thousand five hundred dollars (\$7,500.00). Mariani, the new owner, documented her at Tacoma, fuel, stored and provisioned her, and brought her to San Pedro,

California, where he intended entering upon a fishing voyage in the waters of Southern California during the tuna season of 1920. Upon his arrival in San Pedro, and in contemplation of his intended fishing voyages, he purchased a large fishing net of the value of six thousand seven hundred three and 49/100 dollars (\$6,703.49) from the Marine Hardware Company, the libellant herein. As soon as the net was delivered to the vessel, Mariani set out with her upon a fishing voyage.

The net not having been paid for, the Marine Hardware Company brought this action to foreclose their maritime lien against the vessel. Included in the libel were several items of materials sold for repairing the net and boat, but which are not material to this appeal [Tr. p. 2].

The Halfhill Packing Company filed a libel in intervention [Tr. p. 11] setting up their mortgage and asking that their rights be determined. They filed no answer to the libel of the Marine Hardware Company, though they ask that libellant be required to prove the allegations of their libel as best they may. The owner of the vessel filed no appearance, though he was present and testified [Tr. p. 82].

The matter was referred to a special master for a hearing and report, and during the hearing before him and upon the argument, the proctors for the Halfhill Packing Company contended that the net furnished by the Marine Hardware Company was in effect "materials and supplies which constituted a part of the original equipment of the vessel, and did not, there-

fore, give rise to a maritime lien." This contention having been sustained, libellant takes this appeal.

There were several other interveners, asserting maritime liens for groceries and other articles, but their various interests were determined satisfactorily to all parties, and the only question upon this appeal is whether or not the libellant, Marine Hardware Company, is entitled to a maritime lien.

In order to shorten the record on appeal, which was somewhat voluminous, a stipulation was entered into under Supreme Court admiralty rule No. 49, section IV. and rule No. of the Circuit Court of Appeals for the Ninth Circuit, specifying what matters were to be included in the record, and further expressly agreeing that "the record (as stipulated to) contains a full, true and correct statement of all the pleadings, orders, decrees, opinions and testimony in any way affecting the libel of the Marine Hardware Company, a corporation, and the defense made thereto by the Halfhill Packing Company, a corporation." This stipulation was signed by all the parties. [Tr. p. 118.]

In order for the libellant to make out a case for a maritime lien against the said vessel for furnishing supplies it is necessary for it to show, under the Act of 1910 and the amendments thereto, first, that supplies were ordered by the master or owner of the vessel, or someone by him or them authorized; second, that the supplies so furnished were necessary and proper to be used on the vessel in making its intended voyage or voyages; third, that they were delivered to and

used by and on the vessel. Those three things were conclusively shown by the testimony introduced on the part of the libellant [Tr. pp. 52 and 82], and the special master in his report specifically found that the libellant had proved those facts. The proof thereof *prima facially* established a maritime lien in favor of the libellant herein for the full amount claimed by its libel.

The defense urged by the Halfhill Packing Company is a special defense and while it was not pleaded, still the burden is on the claimant, or the person setting out such a defense, to prove it, and it must be proved by a preponderance of the evidence.

The evidence introduced by the Halfhill Packing Company in support of their defense is set forth in transcript, page 92. etc., it being the testimony of Mr. Mariani, who was master and owner of the gasoline launch "Mountaineer." He testified that the vessel was built at Tacoma, Washington, in the year 1920; he stated that it has been built for a purse seine boat; that a purse seine boat is somewhat different from the ordinary kind of a boat in that it has a different kind of a winch on it than the ordinary boat; that it has a big platform on it for a net and a big bored stern to hold the net; that after the vessel was built in Tacoma, Washington, he provisioned it and purchasing the necessary articles to enable him to cook and then left for San Pedro, California, for an intended fishing voyage; that he stopped at San Francisco, California, to have some slight repairs made on the engine, but that he did not do any fishing; that

some time after he arrived at San Pedro from Tacoma he purchased from the Marine Hardware Company the net for the furnishing of which this suit was brought, intending to immediately go on a fishing voyage; that as soon as he got the net he went out fishing. [Tr. pp. 92 to 99].

The greater part of that testimony was admitted over the objections of the libellant and is the only testimony introduced in the action and is the only testimony claimed by the Halfhill Packing Company to show that the net so purchased was part of the original construction and equipment of the vessel so as to bring it within the rule of the ship building contracts. The Marine Hardware Company did not know that the vessel had never fished before.

All of the things necessary to make the "Mountaineer" a purse seine vessel, to-wit: a turntable, a different kind of a winch and a broad stern were put aboard the vessel at Tacoma when she was built and where she was also documented and outfitted. When those things were put aboard the vessel she became a purse seine vessel, she was a completed thing capable of navigating on the sea in any character of a fishing voyage. In fact she came on her own power from Tacoma to San Pedro, a distance of some 1500 miles before the net was put aboard her. She was completely equipped for all navigation necessary to enable her to fish. Mariani did not testify that it was necessary for her to have a net to make her a purse seine vessel, but that she was such a vessel and was so completely equipped prior to her leaving Tacoma. The

net was used by the crew in fishing and was to be used with the vessel and was never at any time a part of the vessel.

The only case directly deciding the point in controversy is the case of

Hiram R. Dixon, 33 Fed., 297.

That case was decided by Judge Benedict in the District Court for the Eastern District of New York, December 15, 1887. It was a proceeding in *rem* to enforce against the steamer "Hiram R. Dixon," a lien for the price of certain fishing nets. The steamer was built at Mystic Bridge, Connecticut, in April, 1883; after having been launched she was towed to New York to receive her boilers and engines and for that purpose she remained in New York until July 4, 1883, where she was enrolled. After her enrollment she proceeded to Bristol, Rhode Island, and there received her outfit for a fishing voyage. As a part of her outfit for that voyage she received the nets in question and thereafter proceeded to sea to engage in the business of catching menhaden. The nets were made to order for the vessel upon the request of her owner during the time she was being built at Mystic Bridge and they were sent by the libellant to Bristol Ferry, where the "Hiram R. Dixon" picked them up. It was contended by the claimants that the contract was one for original equipment and therefore not maritime under the authority of *People's Ferry Co. v. Burs*, 20 How. 393.

In respect to that defense the court had this to say:

“The test of locality is now abandoned. The true test is the subject-matter. The subject-matter of this contract is the outfit of the vessel for a fishing voyage from Bristol Ferry, and the sole object sought to be attained by the contract was the accomplishment of such a voyage. Such a contract relates directly to navigation, business, and commerce on the sea, and is therefore maritime. The contract being maritime, and the nets being necessary for the vessel to enable her to perform an intended voyage, and being received on board at Bristol Ferry, where she was a foreign vessel, by the maritime law a lien attached to the vessel enforceable in admiralty. So, also, in my opinion, an action in *personam* against the owner could have been maintained in admiralty upon the contract when performed.

“Again, it is contended that the contract was one for original equipment, and therefore not maritime. The case of the *Thomas Jefferson* (*People’s Ferry Co. v. Beers*), is cited as authority. In the case of the *Thomas Jefferson*, a contract for building the hull of a ship was held not to be a maritime contract. The only reason given is that the contract was made on land, to be performed on land, and had no reference to a voyage, to be performed. Considering the time when it was made, 1857, this decision is to some extent explained by the statement in the opinion that ‘the question presented involves a contest between the state and federal government.’ In the subsequent case of *The Capitol* (*Roach v. Chapman*), 22 How. 129, argued by Judah P. Benjamin, in 1859, a contract for building a ship,

or supplying engines, timber or other materials for her construction, was held not maritime upon the grounds stated in the case of the *Thomas Jefferson*, that the contract was a contract for construction made on land, and had no reference to a voyage to be performed. These decisions are still law in cases for constructing a ship, made without reference to a voyage to be performed. 'The effect of these decisions is not to be extended by implication to other cases.' *Insurance Co. v. Dunham*, 11 Wall. 28. They do not control this case, because the contract for these nets did have a reference to a voyage to be performed, and besides was not a construction contract. The nets were to be used on a then contemplated voyage, and the sole object of the contract sued on was to enable that voyage to be performed. When they were received by the vessel she was already constructed and had made a voyage from New York to Bristol Ferry."

The facts in the instance case are parallel to the case "*Hiram R. Dixon*"; there the vessel was built to be a fishing vessel, particularly to fish for menhaden, and in order to be able to fish for menhaden it was necessary for her to have a net, just as it is necessary for a purse seine boat, which is of the same general type of a vessel as a trawler, to have a net in order to fish for tuna; she was built and completed with her engines, and the necessary construction and equipment in New York, as this vessel was built in Tacoma. After being fully equipped as a vessel so that she could fish, she proceeded to Bristol Ferry in the state of Rhode Island, just as the "Moun-

taineer" navigated from Tacoma to San Pedro. At Bristol Ferry she procured the nets in question and thereupon proceeded upon her fishing voyage. She was a fishing boat and, of course, it was contemplated that the net should be used for more than one voyage, for it necessarily must have been used until it should be worn out, and it is a matter of common knowledge that a fishing net will last for approximately two seasons of fishing, at least for more than one catch of fish.

The reasoning in the case of the Hiram R. Dixon exactly coincides with the statements made by the Supreme Court in every single case they have decided subsequent to the case of Hiram R. Dixon. It, the Hiram R. Dixon, has not been specifically or by implication overruled by any case decided by the Supreme Court of the United States, nor has it been specifically overruled by any case decided by any Circuit Court of Appeals or any District Court decision, so far as we have been able to determine.

The case relied upon by the court below in support of its judgment is the case of

Thames Tow Boat Company v. Schooner Frances McDonald, 254 U. S., 244.

In that case the Palmer Shipbuilding Company under a definite contract began the building of the schooner at Groton, Connecticut, and thereafter launched the hull. Subsequently it found it was unable to proceed further, and thereupon the appellant, Thames Tow Boat Company, agreed with the owner to complete the work, and for that purpose the hull

was towed to its yard at New London. When the appellee received the schooner she was manifestly incomplete, her masts were not in the bolts and beams and gaff were lying on the dock and she was not "in condition to carry on any service." The appellants relied upon certain cases decided by the United States District Court of Oregon and Washington, and the case of *Tucker v. Allexandroff*, 183 U. S. 424.

The Supreme Court in its opinion specifically overruled the Oregon and Washington cases and held that the fact that the vessel is launched does not make it a completed thing, but that she must be able to carry on the navigation intended before she becomes a complete ship. They cite several cases which we will hereinafter review.

The question involved in that case is whether or not there is any difference between a ship building contract and one made for work and material to complete the *construction* of a vessel after she has been launched and is water born. There were several decisions of the District Court holding that a distinction should be made between the two kinds of contracts, and that any contract concerning the hull of a ship after she was water borne was a maritime contract. The court simply decided that there was no such distinction and held that any work and material necessary to consummate a partial construction is not a maritime contract. The court says:

"Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely

new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. *Edwards v. Elliott*, 21 Wall, 532, 554, 555, 22 L. Ed. 487. *The William Windom* (D. C.) 73 Fed. 496. *Pacific Surety Co. v. Leatham & S. Tow. & Wreck. Co.*, 151 Fed. 440, 245, 80 C. C. A. 670. And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to *consume a partial construction* and bring the vessel into condition to function as intended."

From the above quotation it is apparent that the Supreme Court stays by the principal announced in the "*Hiram R. Dixon*" *Supra*, and holds that any contract made without reference to a voyage and for the construction of a vessel is not a maritime contract; it, of course, follows that a contract made to equip a vessel to carry out an intended voyage or voyages is a maritime contract, and any contract having to do with the vessel after the construction of her has been completed so as to bring her into condition to function as intended is a maritime contract and gives rise to a maritime lien. In the instant case we have the construction entirely at Tacoma, Washington, and a contract made at San Pedro, California, for furnishing of a net for the use of the vessel in a fishing voyage to be undertaken, and which was immediately undertaken after the furnishing of the net.

In a later case decided by the Supreme Court, February 27, 1922, entitled

The Jack o' Lantern, 42 Supreme Court, Reporter, 243.

The Supreme Court limited the decision theretofore made by them in the case of The Thames Tow Boat Company v. the "Frances McDonald," and in that case impliedly overruled some of the decisions cited as authority by the Supreme Court by their former decision. The decision had not been reported at the time of the special master's report.

The "Jack o' Lantern" had been a car barge and was converted by the libellant into a pleasure boat by installing machinery so that she was self-propelling, putting in a dance floor and making other changes necessary to make her a pleasure ferry. The court says: "We are not disposed to enlarge the compass of the rule approved in Thames Tow Boat Company v. the 'Frances McDonald,' under which contracts for the *construction* of entirely new ships are classed as non-maritime, or to apply it to agreements of uncertain intendment—reasonable doubts concerning the latter should be resolved in favor of admiralty jurisdiction."

The two other decisions of the Supreme Court relied upon by the lower court in sustaining its judgment are those of

The Winnebago, 205 U. S. 354, and

North Pacific Steamship Company v. Hall, 249 U. S. 127.

In the *Winnebago* the Supreme Court does not specifically say what materials were furnished that constituted original construction, nor do they say how far the vessel was in her construction at the time the materials and supplies were furnished. However, the Supreme Court's decision affirmed a decision of the Circuit Court of Appeals reported in 141 Fed. 945, and the Circuit Court of Appeals in its opinion makes the following statement:

"As has been stated the vessel was launched March 21, 1903. Some of the materials for her *construction* were furnished in the interim; and it is contended that for these there could be no recovery * * *. A ship launched, but still in the course of *construction*, does not become subject to maritime law, because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce, or, at least, until she is fitted for that purpose; and she ceases to possess a maritime character when she is permanently withdrawn from such service."

The "*Winnebago*" was an appeal from a decision of a state court, appellants claiming that the matters adjudged to be a lien by the said court were within the admiralty jurisdiction of the United States Court.

In the case of the *North Pacific Steamship Company v. Hall*, the court holds that the true basis for distinction between maritime and non-maritime contracts is that contracts for construction are about wood and steel and not about ships. and they are not of and concerning ships until the wood and steel are wrought together and become a ship; until in other words, she

becomes a complete ship capable of all navigation for her intended use and is ready for service.

From these decisions it is apparent that the Supreme Court has taken the stand that because a ship is launched and water borne does not make her a completed ship, but that it is evidenciary only, and may be overcome by proof that she was not sufficiently constructed to carry on the purpose intended and that any contract or any materials or supplies furnished in order to fit a ship out for a particular voyage or voyages is maritime in its nature and does constitute a maritime lien against the ship.

The case of the "Hiram R. Dixon," heretofore cited, was not cited by the Supreme Court in the "Frances McDonald" with disapproval because of the fact that it was approved and the doctrine therein set forth is the same as the doctrine of the Supreme Court. In the "Frances McDonald" it is not cited with approval because it is not material to the particular case under consideration. It has nothing to do with furnishing of supplies for the *construction* of a vessel.

The other cases relied upon by the lower court in the making of its decision are the same as those cited by the Supreme Court in the schooner "Frances McDonald," *supra*. They are Count deLesseps, 17 Fed. 460; Glenmont, 32 Fed. 703, and 34 Fed. 402; Paradox, 61 Fed. 860; McMaster v. One Dredge, 95 Fed. 832; The United Shores, 193 Fed. 552. They were all cited as authority for the proposition that there was no distinction between contracts made for *con-*

struction after the ship was in the water and those made before she was launched.

In *Count deLesseps* the vessel had been partially constructed at New Jersey, and from there towed to Philadelphia where she was completed. Counsel for the libellant contended that the materials furnished by them were not contemplated by the original agreement for construction, there being no question but that the materials furnished were a part of the vessel. The court simply held that the materials and supplies furnished by the libellant were in fact contemplated by the original construction agreement and they were therefore a ship building contract and within the rule.

In the *Glenmont*, 32 Fed. 703, a District Court decision, the court refused to allow claims for fuel, food, bedding and similar articles on the ground that they were a part of the original construction. However, the Circuit Court of Appeals in the same case reported in 34 Fed. 402, which is also cited in the case of the "*Frances McDonald*" refused to acquiesce in the decision of the lower court regarding those particular items and affirms the judgment on a ground not considered by the District Court.

We believe that the Supreme Court approved the principle laid down in that decision rather than the particular items that had been excluded.

In the *Paradox*, 61 Fed. 860, the libellant finished the *construction* of a vessel, which the builder of the hull had left undone. It was clearly a part of the *construction* of the vessel just as much as the building

of the hull, and the court simply decided that because a ship may be water borne does not mean that all contracts concerning her gave rise to a maritime cause of action.

In the *McMaster v. One Dredge*, the court had under consideration the conversion of a scow into a dredge. There they held that a change may be so great as to be in effect a building of a new thing and not a repair of the old, and therefore it was a ship building contract. The effect of that decision is somewhat weakened by the case of the "*Jack o' Lantern*," *supra*.

The decision of the *United Shores* was placed on the ground that the vessel could not navigate without the life boats and rafts and that until she could navigate she was not a completed thing. The *United Shores* was built as a passenger vessel and under the laws of the United States she could not navigate without having certain life boats, life rafts and kindred articles aboard, and therefore the court held that she could not be a completed vessel capable of all navigation intended. In the instant case the "*Mountaineer*" was completely and entirely fitted as a purse seine and was able to navigate as such and was able to go anywhere that it would be necessary for a vessel to go in order for her to fish for tuna, or any other fish. The net furnished by the libellant herein was furnished to her in contemplation of certain fishing voyages which she was about to undertake. It was not furnished for the purpose of completing her as a vessel so that she could navigate.

The last case cited by the Supreme Court in the schooner "Frances McDonald" is the case of "Dredge A," reported in 217 Fed, at page 617. The decision in that case was by Judge Connor of the District Court for the Eastern District of North Carolina, decided October 5th, 1914. The facts were as follows:

One Edmund H. Mitchell having a dredge contract, procured an old dredge and took the same to a shipbuilding company and ordered them to convert it into a dredge suitable for dredging operations he was about to undertake. The shipbuilding company was located at Philadelphia in Pennsylvania, and the work that Mitchell had contracted with the Government to do was to be done at the ports of Oriental, Morehead City and Beaufort in North Carolina.

Pursuant to the contract, Howard S. Roberts, the shipbuilder, caused the old hull to be brought from New York to his yards at Philadelphia and there commenced to fit her out as a dredge. During the work necessary to complete her as a dredge, various persons furnished labor, materials and other things necessary to fit her out as a suction dredge, both while she was on the shore and after she had been launched.

After the dredge had been completed, she proceeded to North Carolina, and started in on her dredging operations. While she was there, before and after engaging in the work, various other parties furnished supplies to enable her to proceed with the work contemplated.

The dredge was completed and turned over to Mitchell at Philadelphia on May 11th, 1911, and she was thereupon towed to Beaufort, N. C., where she started in the work of dredging.

The court divided the claims into two classes, and allowing those based upon supplies furnished after May 11th, 1911, and disallowing those originally prior to May 11th, 1911. The court said:

“Careful consideration, in the light of the principles of maritime law, as announced and enforced by the authorities cited, leads me to the conclusion that the claims originating prior to May 11, 1911, and while the dredge was in the shipyard at Philadelphia, are for *construction*, and not repairs; that the cash and articles furnished between those dates were furnished for *construction*, and not maritime liens. I am also of the opinion that they were furnished upon the credit of Edmund H. Mitchell. The claim for the articles, cash, and materials furnished and labor performed for the dredge after May 11, 1911, and while she was engaged in the work of dredging in Beaufort Harbor, are for repairs and *necessary supplies*, clearly within the admiralty jurisdiction, and constitute maritime liens on the dredge.”

Some of the supplies furnished by various parties after May 11th, 1911, were of a similar nature to those furnished prior to that date. The court specifically finds, in the claim of S. P. Handcock (one of the claims which were allowed) that the items furnished “were necessary and essential to enable the boat to begin and continue the operation of its dredging in

the harbor of Beaufort * * *.” Among the supplies furnished by Hancock were certain pontoons, which were the first pontoons furnished to the dredge, and which were absolutely essential for dredging operations.”

The distinction made by the Supreme Court in all of the cases cited has been whether or not, first, there was a contract for the construction of a ship, that is for supplying her with engines, timber or other similar materials, or, second, that it was a contract made on land to be performed on land and had no reference to a voyage to be performed. Here we have a contract made for furnishing a net to the vessel. A net is not materials used for the construction of a vessel. It is not any part of a vessel, and it does not help her in any way to move or navigate. It is not like a compass or tiller line or check line, rudder, masts or sails, for without them she could not be a completed thing. The contract for the net was not one to be performed on land without any reference to any voyage, but was made specifically with the understanding that it was to be immediately used by the vessel in a voyage to be thereafter undertaken, and the master and owner testified that immediately upon receiving the net he started upon a fishing voyage, and so far as we know, the vessel continued to fish until the time that she was libelled, with the same net aboard furnished by the libellant herein. [Tr. p. 99.]

After the decision of the Supreme Court in the case of *People's Ferry Company v. Beers*, which defi-

nately settles for all time the proposition that contracts for construction of ships are not maritime and do not give rise to a maritime lien upon the vessel built, there arose a controversy as to when a vessel was to be deemed to be completely *constructed*. It had always been a rule of law that as soon as a vessel was launched and water borne she became subject to the jurisdiction of admiralty in so far as torts were concerned. The test of jurisdiction in tort cases has always been the place in which the tort occurred. It was therefore contended that any contracts made of or concerning a ship after she was water borne gave rise to a maritime lien, regardless of whether the contracts were for the construction of a ship or not.

On the other hand it was contended that the true test in contract actions was whether or not they were related to commerce and navigation, and since the Supreme Court had decided that construction contracts were non-maritime and that it made no difference whether a construction contract was made after a ship was launched or not, and that it made no difference whether the construction was performed while the ship was water borne or before she was launched. Prior to the cases of the "Frances McDonald" there had been conflicting authority. The Supreme Court in that case settled that controversy and held that any work and material necessary to consummate a partial construction was non-maritime.

In the instant case we have a vessel completely constructed in Washington. She came under her own

power to San Pedro where she expected to go immediately on a fishing voyage. She needed a net to undertake that fishing voyage. In contemplation of such a fishing voyage she purchased the net from the Marine Hardware Company, libellant herein. Immediately after receiving the net she went out upon her intended voyage. A net certainly is not a part of the construction of a vessel. It is not necessary to enable her to navigate as a fishing vessel. The contracting question here was made in reference to a particular voyage or voyages about to be undertaken by the gasoline launch "Mountaineer." It certainly cannot be said that the contract was not nearly enough related to commerce in order to make it a maritime lien.

The Supreme Court in its decision requires that a contract in order to be non-maritime must be both for *construction and* necessary to bring the vessel into a condition to function as intended. All of the decisions regarding original equipment go off upon the point either that the original equipment furnished was a part of the original ship building contract, or that the particular vessel in question could not navigate for the purpose intended without that equipment. Here no such question has arisen. The original ship building contract is in evidence and the only testimony is that the boat was fully completed and capable of all navigation when she left Tacoma, Washington.

The appellee, Halfhill Packing Company, did not contend that we had not fully established our right to a maritime lien for the sum of six thousand seven

hundred eighty-six and 14/100 dollars (\$6786.14) less payments made of two thousand dollars (\$2000.00), except for their special defense. The commissioner [Tr. p. 20] found that to be a fact.

We submit under the evidence that the libellant, Marine Hardware Company, is entitled to a maritime lien against the gasoline launch "Mountaineer" in the sum of four thousand seven hundred three and 49/100 dollars (\$4703.49) and is entitled to have that lien enforced by a sale of the vessel.

Respectfully submitted,

LOUCKS & PHISTER,

Proctors for Appellant.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Cor-
 poration,

Libellant,

vs.

Gasoline Launch "Mountaineer,"

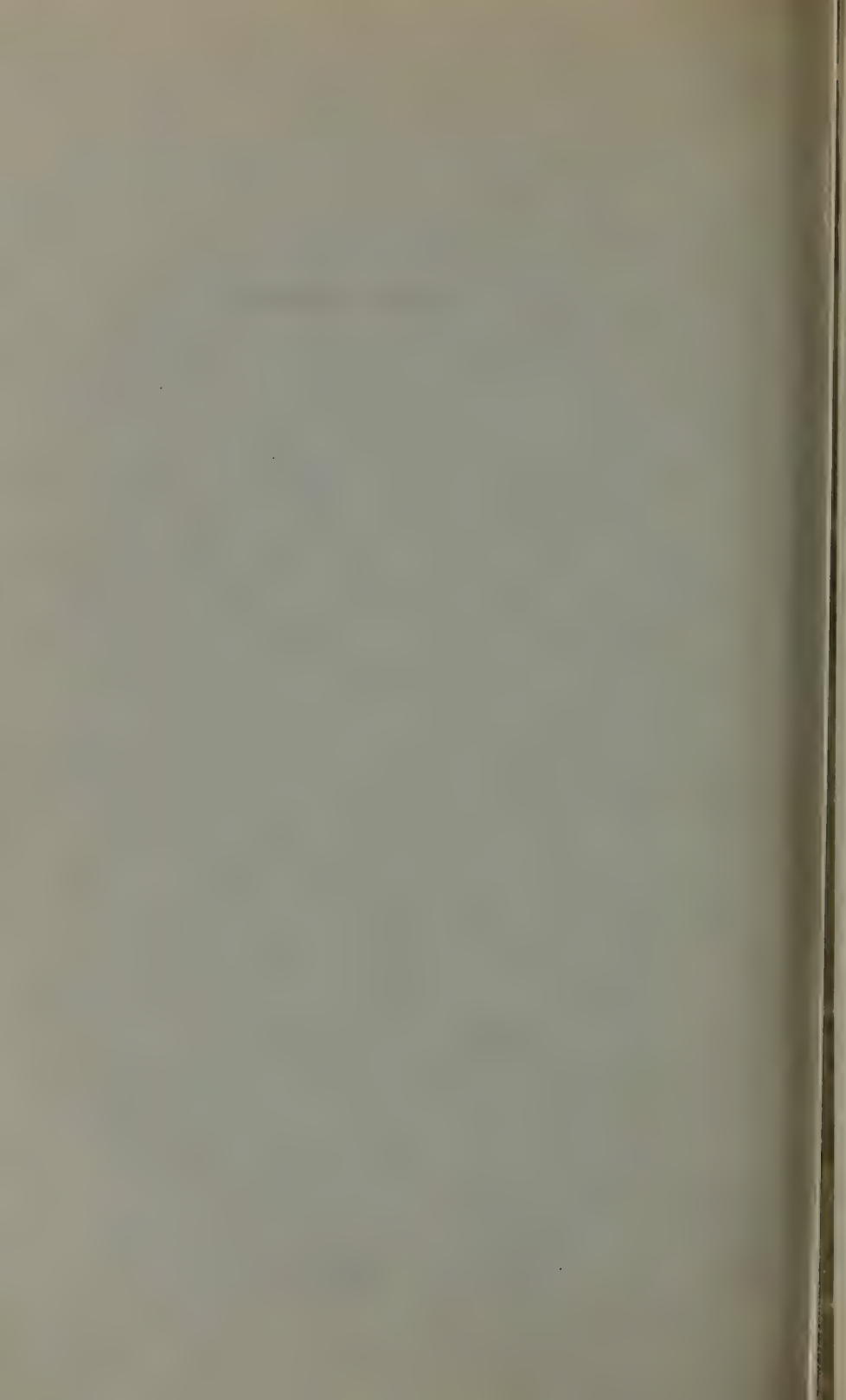
Respondent,

Halfhill Packing Corporation, a Cor-
 poration,

Intervener.

APPELLEE'S REPLY BRIEF.

OVERTON, LYMAN & PLUMB,
 L. K. VERMILLE,
Proctors for Appellee.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Corporation,

Libellant,

vs.

Gasoline Launch "Mountaineer,"

Respondent,

Halfhill Packing Corporation, a Corporation,

Intervener.

APPELLEE'S REPLY BRIEF.

The case at bar involves the furnishing of equipment consisting of a purse seine to a new purse seine fishing vessel to complete the original equipment of the vessel and bring her into condition to function as intended. It must be borne in mind that a purse seine fishing vessel has to be specially constructed in order to enable her to use a purse seine, and that a purse seine is an essential part of the equipment necessary to fit a purse seine vessel for the use intended; and unless equipped with a purse seine such a vessel is of no value as a purse seine fishing vessel and practically useless for any other purpose.

The vessel "Mountaineer" was a specially constructed purse seine fishing vessel built by Barbara Bros. at Tacoma, Washington, under agreement with Halfhill Packing Corporation, a company engaged in packing tuna fish, but was purchased direct from Barbara Bros. by one Mariana [Tr. p. 92] to be used, and she was actually used by him in purse seine fishing. She was, immediately upon launching, brought to San Pedro, where the balance of her necessary equipment, a purse seine, was furnished by the Marine Hardware Company.

The testimony of Mariana [Tr. pp. 92-99] shows conclusively and appellants do not attempt to rebut this, that the purse seine constituted a part of the original equipment of the vessel and that it was an essential part of the equipment which said vessel required to enable her to function as intended, that is, as a purse seine fishing vessel.

Counsel seem to be under the impression that the original equipment furnished to this vessel constitutes a maritime lien, but we think that the distinction is clearly pointed out in the case of *The United Shores*, 193 Fed. 553 at page 554. The court, after holding certain materials furnished to a vessel constituted original equipment for which no maritime lien existed, says:

"The libellants, however, contend that the maritime lien law passed June 23, 1910, modifies and changes the rule of law to which we have referred. By section 1 it is substantially provided

that any person furnishing repairs, supplies, or other necessities to a vessel, whether foreign or domestic, upon the order of the owner, shall have a maritime lien, which may be enforced by a proceeding *in rem*. But in my opinion Congress, by this provision, did not intend to give to this court, sitting in admiralty, jurisdiction of a subject which is not solely of maritime origin. There is nothing contained in the act to lead one to think that Congress intended to change the law that a vessel is completed only when she is fully equipped to engage in navigation and commerce; and it is thought that the terms 'supplies' and 'other necessities' refer to fuel and such furnishings generally as are of use after a vessel is completed and fit to proceed on a trip or voyage."

Counsel make a statement (appellant's brief, p. 7) that the Marine Hardware Company did not know that the vessel had never fished before, but they utterly failed to introduce testimony to that effect, nor would it have been material had they done so.

Counsel further insinuates that a purse seine vessel is the same as any other fishing vessel with certain accessories attached. But counsel well know that the construction is entirely different in that the hull itself is built with a specially broad, flat, stern to hold the weight of the net, that the bulwarks are entirely different and that also a different and peculiar winch is installed, and a large turntable on the stern platform built to handle the net. [Tr. p. 98.] (Appellant's Brief, p. 7.)

The fact that the vessel at the time she left Tacoma was capable of navigating the sea is not the important fact. The important and controlling fact is that she was not as yet completely equipped for the purpose for which she was intended and specially constructed. It was impossible to use said vessel for the purpose for which she was designed and intended without a purse seine, nor was she equipped with an article absolutely essential to enable her to navigate and function as intended prior to being furnished with the purse seine, as shown by Mariana's testimony. [Tr. pp. 92-99.]

Appellant apparently relies upon the District Court case of Hiram R. Dixon, 33 Fed. 297, decided in 1887. (*Italics ours.*) We wish to call attention to the fact that the vessel was not a purse seine fishing vessel. The facts fail to show that the steamer was anything other than an ordinary trading steamer, or that she was built or specially designed or constructed for the sole purpose of fishing. Therefore the net was not an essential part of her original equipment, but was furnished, as stated by the court, as part of her outfit for a *particular voyage*.

Throughout this case the District Court recognizes the doctrine that articles furnished as part of the original construction and equipment of a vessel do not give rise to maritime liens, and it states clearly and emphatically that (p. 298) "In this case, the sole object of the contract sued upon was to enable this vessel to make a *contemplated fishing voyage*." And again, (p. 299) "The nets were to be used on a *then contem-*

plated voyage, and the sole object of the contract sued upon was to enable *that voyage* to be performed." There is nothing said in this case, which, even by implication, can be construed as deciding that the furnishing of a particular kind of net to a vessel specially designed and built for fishing with such a net, and without which her original equipment would not have been complete, and without which she would have been unable to function, would give rise to a maritime lien. This question was not before the court in that case, and therefore it is in no way decisive of the point involved in this appeal. The only statement in that case which might be taken as implying that a contract to furnish nets is always maritime in its nature, is the statement (p. 300) "That fishing instruments are not to be deemed a part of the ship appeared as long ago as the laws of Oleron and the preceding question "Are the furnishers of harpoons and lines to a whaler before she is launched, builders of a ship?" When it is considered that the distinction drawn by our courts between construction contracts and contracts for supplies after construction, is exclusively a distinction enunciated by the courts of the United States, and is not to be found in any other jurisdiction so far as we are aware, it is obvious that the laws of Oleron can not be taken as authority. As to the reference to whalers, these vessels are always large sea going cargo boats, useful and often used for various purposes other than whaling. There is nothing special about the design or construction of the hull of a whaler, which renders it adapted only to whaling. When a vessel is

to be put in the whaling trade certain special appliances are put aboard, such as boiling vats, guns, harpoons, etc. And though she may be built with the intention of putting her in the whaling trade, her whaling paraphernalia are mere superficial accessories, and when these are removed she can be used as a freighter, sealer, or for many other purposes. There is a vast distinction between this and the case of a vessel *specially* constructed as to hull, winches, etc., for a particular business. Would it, for instance, be said that the cables, cutter, suction pumps and other paraphernalia necessary to originally equip a vessel designed and built as a seagoing suction dredge, and without which she cannot operate as a dredge, are not part of her original construction even though without this paraphernalia she may be able to go to sea and navigate?

The Jack-o-Lantern, 42 Supreme Court Reporter, 243, cited by appellant is not in point, as the facts consist of the conversion of a car barge into a pleasure ferry which the court held constituted the rebuilding of an old vessel and was a maritime contract.

Appellant cites *The Dredge A.* 217 Fed., 617. (Italics ours.)

This was a case where an old hull was reconstructed into a suction dredge at Philadelphia, Pa., and towed to Beaufort, North Carolina, for dredging purposes. During its construction various parties furnished equipment necessary for her operation as a dredge, also various other parties furnished materials while said dredge was in operation at Beaufort.

The court (p. 621) divided the various claims in two general classes (1) Those originating while said dredge was under construction between Dec. 10, 1910 and May 11, 1911, (2) Those originating *while said dredge was operating at Beaufort, North Carolina.*

The court (p. 635) clearly points out that the claims originating after May 11, 1911, were for necessities, being for materials, supplies and repairs furnished after the dredge was completed and *while actually engaged in the work for which it was constructed.*

The court (p. 636) said that all claims originating prior to May 11, 1911, constituted a part of the original construction and equipment of the dredge and therefore were not maritime liens. That the claims for materials furnished *while she was engaged in the work of dredging* for repairs and necessary supplies constituted maritime liens.

Counsel make the statement (App. brief p. 20) that the court specifically finds that the materials and supplies furnished after May 11, 1911, "were necessary and essential to enable the boat to begin and continue the operation of its dredging."

We fail to find any such statement made by the court. However, the special master in referring to the claim of Hancock in the first part of his finding makes such statement. We think the word "begin" in the quoted portion of the master's finding is obviously carelessly and unintentionally used as it is not consistent with the balance of the finding. This finding occurs at p. 634 and is finding "No. 13." In the first

sentence of the finding the master states that the claim is for "supplies and cash furnished for the payment of supplies for the protection and preservation of Dredge A *while engaged in dredging* at the port of Beaufort, North Carolina. The master then states what the supplies and payments were for, and it is apparent that they were all for articles and seamen's wages furnished and paid during the dredging operations. And immediately following the sentence in which he says that the amounts and items so advanced were necessary and essential to enable the boat to begin and continue the operation of its dredging, he states:

"At the time of the original furnishing of said amounts, said dredge was in a condition wherein it was necessary to have and maintain a sufficient crew to operate the machinery on said boat in order to keep the said boat from accumulating bilge water and to protect and preserve the same, that it might *continue* the contract of dredging * * *. Without the item so furnished by libellant Mitchell (the owner of the dredge) could not have *continued its operation*."

Our conclusion that the word "begin" was carelessly used is borne out by the decision of the court in reference to these supplies. The court said (p. 635)

"The foregoing claims are clearly for necessities, being for materials, supplies and repairs. They were furnished *after* the dredge was complete, and, while *actually engaged in the work* for which it was constructed."

We think the balance of appellant's brief is fully answered by the following authorities.

In Benedict on Admiralty, 4th Edition, section 183, we find the following:

“Not only the building of the hull but the supplying of the original equipment of the vessel is held to be outside of the admiralty jurisdiction on the theory that the vessel is not ‘built’ until completed for the purpose designed and whatever is supplied to such a vessel for the purpose of making her what she is intended to be in part of her ‘building.’”

* * * * *

The *Isosco*, Case No. 7060, 13 Fed. Cases, 89.

A hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where the materials and work for which the libel was filed were done. The court said (*Italics ours*):

“What libellants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law repairs and materials and for which by that law an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. * * * *The vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended.*”

The Count De Lesseps, 17 Fed. 460. (1883
Dist. Ct. E. D. of Pa.)

This was a libel for labor and materials consisting of a derrick, buckets and other paraphernalia furnished at Philadelphia after the vessel had been towed from New Jersey, where she had been built, to fit out the vessel for an intended voyage to Panama. It was contended by the respondent that the same were furnished in the original construction of the vessel and were necessary to equip her for canal dredging; that the vessel was not useful for any other purpose. The libellants contended on the other hand that the vessel was capable of carrying any cargo, and prior to the work was towed from New Jersey to Pennsylvania having a completed outfit and machinery, and that when it appeared that further machinery was desirable, the contract was made with libellants to furnish the materials not contemplated by the original design.

The court said:

"All the materials and work were completed as necessary to complete the structure from the beginning. What the libellants did should be held to have been done in the original construction of the vessel. * * * The question involved has been so fully considered in cases undistinguishable from this that further discussion would serve no useful purpose. See *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Edwards v. Elliott*, 21 Wall. 532; *The Ship Norway*, 3 Ben. 163; *Scull v. Shakespear*, 25 P. F. Smith, 297; *Morewood v. Enequist*, 23 How. 494; *The Pacific*, 9 Fed. Rep. 120."

* * * * *

In re Glenmont, (District Court of Minnesota),
32 Fed. 703.

The facts were these: A month after the hull of the steamboat was built and the propelling power put in, libellant furnished her with stores, fuel, tiller line, check line, copper wire, packing for machinery, pails for roof, beds and bedding, etc. On the day this outfit was received, the boat made her first trip. The original contract did not include said materials and outfit. It was held that the original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and that no maritime lien existed. The court said (*Italics ours*):

“The question presented for determination, and the only one, in my opinion, is whether the materials furnished are a part of the original construction to complete the structure, *and make it a vessel serviceable for the navigation contemplated*, or was the steamboat entirely complete and adapted for the intended use at the time the materials were furnished by the libellants.

I cannot doubt that *the materials furnished were necessary, according to the original design, and the steamboat would not be suitable for the navigation intended without the tiller-rope, check-line, bedding etc.*, included in the libellants’ bill of items. *The original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and no maritime lien exists.* The question presented was settled in *Ferry Co. v. Beers*, 20 How. 393; *Edwards v. Elliott*, 21 Wall. 532; *Roach v. Chapman*, 22 How.

129; *Morehead v. Enequist*, 23 How. 494. See the *Pacific*, 9 Fed. Rep. 120; *The Norway*, 3 Ben. 163; *The Count de Lesseps*, 17 Fed. Rep. 460. *The Eliza Ladd*, 3 Sawy. 519, is not in harmony with the above cases.

The libel is dismissed with costs, and a decree so ordered."

This case was affirmed by the Circuit Court of Appeals in 34 Fed. 402. The court say (*Italics ours*):

"The district judge dismissed the libel, on the ground that the materials furnished were part of the original construction, and necessary to complete the vessel and make it serviceable for navigation; holding that because of this fact no maritime lien existed, citing: *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Morewood v. Enequist*, 23 How. 494; *Edwards v. Elliot*, 21 Wall. 532; *The Pacific*, 9 Fed. Rep. 120; *The Count de Lesseps*, 17 Fed. Rep. 460; *The Norway*, 3 Ben. 163. Of the correctness of the general proposition that no maritime lien exists on a contract for building a vessel, or for furnishing materials for such building, or the supply of machinery for the original construction, or work done thereon, there can be no doubt. The cases cited abundantly establish that; and I think it clear from the testimony that a portion of the articles for which this libel was filed came within that rule. It may be doubted whether that is true of all or whether some of the articles were not rather supplies furnished to the vessel *after its completion, and while it was engaged in navigating the Mississippi*. Still, I think the decree of the Dis-

strict Court dismissing the libel *in toto* was right, for one, if not more, reasons.” (34 Fed. 403.)

* * * * *

In re The Paradox (District Court S. D. N. Y.)
61 Fed. 861.

The Paradox was a yacht designed and built for the purpose of experimenting with a system of water-jet propulsion. The libellant and its immediate predecessor contracted to put in the propelling machinery. The court said (*italics ours*):

“The evidence leaves no doubt that all the machinery was contracted for and supplied for the purpose of completing the construction of the vessel as an experimental yacht, in accordance with the original design. The libellant’s officers understood this from the beginning. After the hull, constructed by other persons, was sufficiently advanced, it was launched, towed to the libellant’s yard, and the machinery there put in by the libellant company, and by the preceding company, with changes of detail from time to time in the course of construction so as to make the machinery as efficient as possible.

In the case of *The General Cass*, 1 Brown, Adm. 334, Fed. Cas. No. 5,307, Longyear, J., says:

‘The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, *is the business or employment for which it is intended*, or is susceptible of being used, or in which it is actually engaged, rather than its size, ‘form, capacity or means of propulsion.’

"When the vessel is completed for the purpose intended, then the vessel is 'built,' and not till then, whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house (The Public Bath No. 13, 61 Fed. 692); and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the 'building' of the vessel. This is the clear weight of authority. The case seems to me to be entirely within the decisions of Roach v. Chapman, 22 How. 129; in re Glenmont, 32 Fed. 703; The Pioneer, 30 Fed. 206; The Isosco, 1 Brown, Adm. 495, Fed. Cas. No. 7,060; Wilson v. Lawrence, 82 N. Y. 409; in which cases all the suggestions and arguments of the libellants seem to me to be met and overruled.

"I much regret the necessity of this conclusion in the present case; but it seems unavoidable upon the authorities, and I must, therefore, dismiss the libel, though without costs, as not based upon a maritime contract, and hence not within the jurisdiction of this court." (61 Fed. 861.)

* * * * *

McMaster v. One Dredge (Dist. Ct. Ore. 1899),
95 Fed. 832.

The libel was for materials and labor in converting a scow into a dredge. The scow had never been used as a dredge. The machinery upon which the repairs mentioned were made and the furnishings provided had never been on the scow, but were a necessary part

of the equipment and appliances required for her conversion into a dredge.

The court, after reviewing the *Isosco*, *The Pacific*, 9 Fed. 120, *The Count de Lesseps*, and *The Paradox*, said (*italics ours*):

“The case of *The Paradox*, 61 Fed. 860, is similar to the case last cited. Here it is held that a contract for the machinery of a vessel is not enforceable in admiralty, where such machinery was supplied for the completion of the construction of the vessel, and such vessel was not then *completed for the purpose for which she was intended*. The court says:

“When the vessel is completed for the purpose intended, then the vessel is “built”, and not till then, whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house; *and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the “building” of the vessel.*”

“Tried by this criterion, the work and labor and materials furnished in this case were for the building of the vessel.”

In the *Winnebago*, 205 U. S. 354, at page 362 (1907) the court says (*italics ours*):

“It is next objected that the court erred because *certain items* were allowed for *material furnished* the vessel *after she was launched*, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But

we agree with the state court that *these items were really furnished for the completion of the vessel and were fairly a part of her original construction*. In such a case the remedy was within the jurisdiction of the state court. The *Isosco*, Fed. Cas. 7060; The *Victorian*, 24 Oregon, 121; The *Winnebago*, 73 C. C. A. 295;" (205 U. S. 362).

* * * * *

The *United Shores* (Dist. Ct. W. D. N. Y. 1912), 193 Fed. 552.

That was a proceeding *in rem* against the passenger steamer *United Shores* to enforce a lien for the purchase price of certain lifeboats, life rafts, life preservers, and releasing hooks for life boats. After the steamer was launched, the materials were shipped and delivered to her; it was claimed by the libellants that while the articles furnished were necessary by law, that they were no part of the actual construction of the vessel as were her engines, hull, boiler, etc., and that they were not essential to the completion of the vessel, as that term is commonly understood, and that, therefore, a maritime lien existed therefor.

But the court said (*italics ours*):

"But I think that such articles were a part of her original equipment and essential to her completion. She was not a fully equipped or completed vessel without them, since her practicability, or at least her right to navigate and carry passengers, required that she be provided with such life-saving apparatus to fit her for her intended pur-

pose. American & English Encyc. of Law, Vol. 19, p. 1902; Benedict's Admiralty (4th Ed.) S. 183. Without it she was an incompleated vessel and outside of the admiralty jurisdiction of this court, *Roach et al. v. Chapman et al.*, 22 How. 129, 16 L. Ed. 294; *Edwards v. Elliott et al.*, 21 Wall, 532, 22 L. Ed. 487; *In re Glenmont* (D. C.) 32 Fed. 703. And it is *not of material importance that the supplies were furnished by the libellants subsequent to launching the steamer.* The *Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; The *Paradox* (D. C.) 61 Fed. 860.

“In the *Glenmont*, *supra*, articles such as *tiller lines, fuel, copper wire, deck line, bedding, etc., were furnished to enable a vessel to proceed on her voyage*, and the question arose whether a maritime lien or contract existed for the sale of such articles. The court held substantially that the single question was whether such supplies or materials *were part of the original contract to build the vessel and make her ‘serviceable for the navigation contemplated’* and as the original construction of the boat contemplated as such all the materials mentioned, no maritime lien existed, and the federal court was without jurisdiction. *That this rule has been universally recognized and followed the cases already cited show.* So, in this case, it was necessary that the United Shores should have aboard the articles furnished by libellants to *make her serviceable for the purpose for which she was built.*” (193 Fed. 553-4.)

* * * * *

Thames Towboat Company v. The Schooner Francis McDonald, 254 U. S. 244. (Italics ours.)

The Supreme Court had the following question before it for final decision: "Is appellant's contract to furnish the materials, work and labor for her completion made after the schooner was launched, *but while yet not sufficiently advanced to discharge the functions for which it was intended within the Admiralty and maritime jurisdiction?*" The District Court thought not and so do we. In arriving at this conclusion the Supreme Court held the following cases entitled to the greater weight:

- The Isosco, 1 Brown, Adm. 495, Fed. Cas. No. 7.060;
- The Pacific, 5 Hughes, 257, 9 Fed. 120;
- The Count de Lesseps, 17 Fed. 460;
- The Glenmont, 32 Fed. 703 and 34 Fed. 403;
- The Paradox, 61 Fed. 860;
- McMaster v. One Dredge, 95 Fed. 832;
- The United Shores, 193 Fed. 552;
- The Dredge A, 217 Fed. 617;
- The Winnebago, 205 U. S. 354, 363, 51 L. Ed. 836, 841 27 Sup. Ct. Rep. 509;
- North Pacific S. S. Co. v. Hall Bros., Marine R. & Shipbuilding Co., 249 U. S. 119, 125, 63 L. Ed. 510, 512, 39 Sup. Ct. Rep. 221."

From the foregoing authorities it is apparent that the important and controlling fact to be determined is: was the "Mountaineer" when she left Tacoma without her purse seine, suitably equipped for the navigation and purpose for which she was designed and intended. That she was intended for purse seine fishing is not questioned by appellant's counsel, nor do they even intimate that a purse seine was not necessary to enable her to function as intended. The basis of their argument is: she was able to navigate the seas,—but this is not the criterion by which to try this case. Throughout appellant's brief, they have perforce quoted the true criterion. We will quote from their brief (p. 12): "the fact that the vessel is launched does not make it a complete thing, but that she must be able to carry on the navigation intended before she becomes a complete ship." (Thames Towboat Co. v. Schooner Francis McDonald, 254 U. S. 244.)

(P. 13): "And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." (Thames Towboat Co. v. Schooner Francis McDonald.)

(Pp. 15-16): "until in other words she becomes a complete ship capable of all navigation for her intended use and is ready for service."

(P. 23): "The Supreme Court in its decision requires that a contract in order to be non-maritime

must be both for construction and necessary to bring the vessel into a condition to function as intended. All decisions regarding original equipment go off upon the point either that the original equipment furnished was a part of the original ship building contract or that the particular vessel in question could not navigate for the purpose intended without that equipment."

In conclusion, we would like to invite attention to Honorable Benjamin F. Bledsoe's Memorandum Opinion [Tr. pp. 40-44] confirming the special master's report. We further invite attention to the fact that a bond staying execution has been filed, that the vessel is still in custody and that regardless of whatever decree may be rendered by this court or on mandate of this court by the court below the proceeds from the sale will not now be sufficient to satisfy all claims, and that unless a decree be rendered for such deficiency against the surety on its stay of execution these liens cannot be fully satisfied.

We submit that under the clear weight of authority the purse seine furnished to the "Mountaineer" was a part of her original equipment for which no maritime lien exists.

Respectfully submitted,

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